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Brief
in Gallaher vs
Johnson Schmitt

SUPREME COURT OF THE UNITED STATES.

No. ~~333~~. 469. 91.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

ROBERT COLES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

G. S. Gideon, Printer, 511 Ninth street, Washington.

SUPREME COURT OF THE UNITED STATES.

No. 333.

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vs.

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THE UNITED STATES OF AMERICA,
District of Iowa, ss.

In the District Court for said district, May term thereof, 1858, in the southern division of said district.

THE UNITED STATES OF AMERICA
vs.
ROBERT COLES, HENRY B. HENDERSHOTT, Thomas G. Given, and George Gillaspy. } Debt.

TO THE COURT:

The plaintiff, the United States of America, claims of the defendants, Robert Coles, Henry B. Hendershott, Thomas G. Given and George Gillaspy, the sum of ten thousand dollars, which sum the plaintiff says is due it from the said defendants; and for cause of such claim states that heretofore, to wit, on the twenty-third day of May, A. D. 1853, the said Robert Coles, having been appointed by the President of the United States aforesaid, register for the district of lands subject to sale at Chariton, in the State of Iowa, did on said date, at the district aforesaid, make, execute, and deliver to the plaintiff his bond as such register, in the penal sum of ten thousand dollars, with the said Henry B. Hendershott, (who executed said bond by the name and style of H. B. Hendershott,) Thomas G. Given, and said George Gillaspy as his sureties, and who executed said bond as such—said bond being upon condition that said Robert Coles had then, and thereafter should continue to faithfully and truly execute and discharge all the duties of the said office of register as aforesaid, according to law; and the said Robert Coles then and there undertook and promised the plaintiff that he then had, and that he thereafter would, truly and faithfully execute and discharge all the duties of said office of register as aforesaid. And the said Henry B. Hendershott, Thos. G. Given, and George Gillaspy then and there undertook and promised the plaintiff that the said Robert Coles then had and thereafter should continue, truly and faithfully, to execute and discharge all the duties of his said office of register—which said bond, so executed by the said defendants as aforesaid, is in words and figures as follows, to wit:

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT,
July 30th, 1857.

Pursuant to the act of Congress of 22d February, 1849, I hereby

certify that the annexed is a true copy of the original bond of Robert Coles, register for the district of lands subject to sale at Chariton, in the State of Iowa, dated 23d May, 1859, with the accompanying papers—the original being on file in this department.

In witness whereof I have hereunto set my hand, and caused the [SEAL.] seal of the *seal of the* Treasury Department to be affixed, on the day and year first above written.

HOWELL COBB,
Secretary of the Treasury.

GENERAL LAND OFFICE,
June 13, 1853.

Approved upon the certificate of the district attorney, and affidavits which do not embrace the name of Mr. Osborn, who did not sign the bond, and the other differences from the printed form not being deemed material.

JOHN WILSON,
Commissioner.

Know all men by these presents, that we, Robert Coles, Henry B. Hendershott, of Ottumwa. Iowa, George Gillaspy, of Ottumwa, Iowa, Thos. G. Given, of Ottumwa, Iowa, and Stephen Osborne, of Ottumwa, Iowa, are held and firmly bound unto the United States of America in the full and just sum of ten thousand dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 23d of May, in the year one thousand eight hundred and fifty-three.

The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said Robert Coles register for the district of lands subject to sale at Chariton, in the State of Iowa, by commission dated the fourth day of April, 1853:

Now, therefore, if the said Robert Coles has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of the said office according to law, then the above obligation to be void and of none effect; otherwise, it shall abide and remain in full force and virtue.

ROBERT COLES, [SEAL.]
H. B. HENDERSHOTT, [SEAL.]
THOS. G. GIVEN, [SEAL.]
GEORGE GILLASPY. [SEAL.]

Signed, sealed, and delivered in the presence of—
SILAS OSBORNE,
JAMES BAKER,
Witness to all signatures.

(The word "force" interlined before signing.)

I, Robert Coles, having been appointed register for the district of lands subject to sale at Chariton, in the State of Iowa, do solemnly swear that I will support the Constitution of the United States, and will faithfully execute the trust committed to me.

ROBERT COLES.

Subscribed and sworn to before me this 23d day of May, A. D. 1853.

SILAS OSBORNE,
County Judge.

STATE OF IOWA,
Wapello County.

We, undersigned, being duly responsible for the amount set opposite to their respective names, each testifying to his own responsibility only.

HENRY B. HENDERSHOTT - - - - -	Three thousand dollars.
THOS. G. GIVEN - - - - - - - -	Three thousand dollars.
GEORGE GILLASPY - - - - - - -	Five thousand dollars.

[SEAL.]

Subscribed and sworn to before me at Ottumwa. Witness my hand, with the official seal of the county court of said county, May 23d, 1853, hereto affixed.

SILAS OSBORNE,
County Judge.

[SEAL.]

OFFICE OF U. S. ATTORNEY FOR THE DISTRICT OF IOWA.

I hereby certify that I have examined the bond in the penal sum in ten thousand dollars, dated May 23d, 1853, signed by Robert Coles, as principal, payable to the United States of America, conditioned for the faithful execution and discharge by the said Robert Coles of the duties of the office of register for the district of lands subject to sale at Chariton, in the State of Iowa, which said bonds is signed by Henry B. Hendershott, George Gillaspy and Thomas G. Givenas sureties, all free holders and citizens of Ottumwa, Wapello county, Iowa, and with all of whom I am personally acquainted, and from such knowledge do certify that they are sufficient to secure the payment of the said penalty of ten thousand dollars. Given under my hand and at Keosau , May 24, 1853.

JOSEPH C. KNAPP,
U. S. Att'y for the Dis't of Iowa.

Which said foregoing bond, or certified copy thereof, herein attached (marked on the margin petition, page 4, and petition, page 5,) the plaintiff makes part of his petition, and which said copy so certified he will offer in evidence upon the trial of said cause.

And the plaintiff says that a part of the duties of said office of register was to receive for and pay over to the plaintiffs certain moneys which he, the said Robert Coles, was entitled to receive, and which he was authorized and required by law to receive by virtue of his said office, for land fees &c., &c., and the true and faithful execution and discharge of the duties of said office required the said Robert Coles to pay over, according to law, to the said plaintiff, all moneys by him received by virtue of his said office, belonging to the said plaintiff, whether for lands, or as fees, or otherwise; and the plaintiff says that, as such register, the said Robert Coles did receive large sums of money for lands, fees, &c., belonging to the plaintiff, which he neglected and refused to pay to the said plaintiff as required by law, and the conditions of his said bond—that is to say, the sum of ten thousand dollars; and so the plaintiff says he violated the conditions of said bond, whereby the defendants became liable to pay to the said plaintiff the said sum of ten thousand dollars, as damages for the breach of said covenants; and the plaintiff shows to the court here, and avers, that the said Robert Coles, during the time he held and possessed said office of register, as aforesaid, received as fees for the location, at his said office, of military bounty-land warrants, the sum of $11,824 36, under the acts of Congress approved 11th of February, 1847, 25th of September, 1850, 22d of March, 1852, and 3d of March, 1855, said amounts being received by said Coles during the first, second, third and fourth official years—that is to say, from the 30th of March, 1853, to the 30th of November, 1856; and of which said amount so received, as aforesaid, the said Coles still keeps and retains unlawfully, and without authority of law, the sum of six thousand nine hundred and eighty-five dollars and eighty-five cents, and refuses to pay the same to the plaintiff, though often requested and directed to do so by the proper officer, for and on behalf of the plaintiff; and which said sum, with such interest as is by law due on the same, is the true sum claimed as damages against the defendants in this case. And the plaintiff makes part of his petition, and specially directs the attention of the defendants to the account hereunto attached, marked No. 13,387, with the statements attached to said account, marked "A," "B," "C," "D," and "E," and referred to in said account, and which are also attached to and made part of this petition, all of which will be offered in evidence on the trial of this cause, and to all of which the defendants are referred for a full and particular statement of the amount received for such fees, under such acts, the time when received, under which act, and the amount paid, and the amount now due, and on what

account. Said account, No. 13,387, bears date—"Department of the Interior, General Land Office, 30th May, 1857; signed by Thos. A. Hendricks, Commissioner; admmitted and certified 28th July, 1857, by W. Medill, Comptroller."

TREASURY DEPARTMENT,
REGISTER'S OFFICE, *August* 12, 1857.

Pursuant to the act of March 3d, 1797, entitled "An act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys," I, F. Bigger, Register of the Treasury Department, do hereby certify that the annexed are true copies of original report numbered 13,387, on file in this office, upon an account between the United States and Robert Coles, late register of the land office at Chariton, Iowa, and of original statements marked A, B, C, D, and E, accompanying said report, also on file in this office.

F. BIGGER,
Register.

Be it remembered, that F. Bigger, esq., who certified the annexed transcript, is now, and was at the time of doing so, Register of the Treasury of the United States, and that full faith and credit are due to his official attestations.

In testimony whereof, I, Howell Cobb, Secretary of the Treasury of the United States, have hereunto subscribed my name, [SEAL.] and caused to be affixed the seal of this department, at the city of Washington, this twelith day of August, in the year of our Lord 1857.

HOWELL COBB,
Secretary of the Treasury.

No. 13,387. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, 30 *May*, 1857.

SIR: I have adjusted an account between the United States and Robert Coles, late register of the land office at Chariton, Iowa, on account of fees received by him for the location of military bounty land warrants, under the provisions of the acts of Congress approved 11th February, 1847, 25th September, 1850, 22 March, 1852, and 3 March, 1855, from the 30 March, 1853, the day expressed in his commission as the commencement of his term of service, to the 1 December, 856, when his successor receipted to him for the books and papers of his office, and found that he stands chargeable on said account as follows:

To fees received for locating military bounty land warrants:
For this amount received by him during his first official year, being from 30th March, 853. to the 29 March, 1854, as per statements A, B, D, and E, herewith 1,266 35

For this amount received by him during his second official year, being from the 30 March, 1854, to the 29 March, 1855, as per statements A, B, D, and E, herewith	1,033 33
For this amount received by him during his third official year, being from the 30 March, 1855, to the 29 March, 1856, as per statements A, B, D, and E, herewith	5,622 73
For this amount received by him during his fourth official year, being from the 30 March, 1856, to the 30 November, 1856, as per statements A, B, D, and E, herewith	3,900 95
	$11,824 36

I also find that he is entitled to the following credits, viz: By commissions for locating military bounty land warrants:

For this amount, to which *his* entitled as commissions on $126,635 42, the value of 101,308.34 acres of land, at $1 $\frac{25}{100}$ per acre, located by warrants under the provisions of the acts of 1847, 1850 and 1852, and for which quantity said warrants were relinquished as per statements A, B, D, and E, herewith, sufficient to make his maximum compensation for his first official year, being from the 30 March, 1853, to the 29 March, 1854	909 33	
For this amount, to which he is entitled as commissions on $390,195 30, the value of 312,156.24 acres of land, at $1 $\frac{25}{100}$ per acre, located by warrants under the provisions of the acts of 1847, 1850, 1852 and 1855, and for which quantity said warrants were relinquished as per statements A, B, C, D, and E, herewith, sufficient to make his maximum compensation for his fourth official year, being from the 30 March, 1856, to the 30 November, 1856.	1,298 91	
		2,208 24

By warrants in favor of the Treasurer:

For amount of counter warrant No. 169, *day* 27 May, 1857, which issued upon pay warrant No. 4,276, dated 27 May, 1857, being for his salary due and commissions on lands entered, as follows:	

For his first official year due him	171 36		
second ditto, sufficient to make his maximum.....	513 94		
third ditto, sufficient to make his maximum.....	411		
fourth ditto, due him.....	1,533 36		
		2,630 27	2,630 27
			4,838 51
And that the balance due by him to the United States on the 30 November, 1857, amounted to.....			6,985 85
			11,824 36

As appears from the documents, vouchers, and statements A, B, C, D, and E, herewith, respectfully submitted for your action and decision thereon.

THOS. A. HENDRICKS,
Commissioner.

WILLIAM MEDILL, Esq.,
First Comptroller of the Treasury.

TREASURY DEPARTMENT,
Comptroller's Office.

Admitted and certified this 28 day of July, 1857.

M. MEDILL, *Comptroller.*

To the REGISTER.

A.—*Act of* 1847.

Statement showing the number of acres of land located at the land office at Chariton, Iowa, with military bounty land warrants issued under the act of 1847, with the number of warrants of each denomination, from the 25th day of May, 1853, to the 30th of November, 1856, inclusive.

In what year located.	Number of warrants located.	Denomination of warrants located.	Number of acres represented.	Excess in area paid for with money.	Deficiencies in area.
From 25th May, 1853, to 29th Mar., 1854, inclusive.	116 6	For 160 acres. " 40 "	18,560 acres. 240 "		
	122	.....	18,800 " 8.84	114.12 acres.	884 acres.
Deduct deficiency.....	.....	.....			
			18,791.16 "	114.12 "	8.84 "
From 30th of March, 1854, to 29th March, 1855, inclusive.	109 21	For 160 acres. " 40 "	17,440.00 " 840.00 "		
	130	.....	18,280.00 " 2.98 "	29.72 acres.	2.98 "
Deduct deficiency.....	.....	.....			
			18,277.02 "	29.72 "	2.98 "

From 30th March, 1855, to 29th 29th March, 1856, inclusive.	96 16	For 160 acres. " 40 "	15,360.00 acres. 640.00 "	43.21	10.22 acres.
	112	.....	16,000.00 " 10.22 "		
Deduct deficiency.....	.....	.....			
			15,989.78 "	43.21	10.22 "
From 30th March, 1856, to 30th November, 1856, inclusive.	30 1	For 160 " " 40 "	4,800.00 " 40.00 "		
	31	.....	4,840.00 "		
Deduct deficiency.....	.....	.....	00.00 "	15.36	
			4,840.00 "	15.36	00.00 "
RECAPITULATION.					
From 25th May, 1853, to 30th Mar., 1854, inclusive.....	.....	.....	18,800.00 "	114.12	8.84 "
From 30th March, 1854, to 29th March, 1855, inclusive.....	.....	.....	18,280.00 "	29.72	2.98 "
From 30th March, 1855, to 29th March, 1856, inclusive.....	.....	.....	16,000.00 "	43.21	10.22 "
From 30th March, 1856, to 30th November, 1856, inclusive.....	.....	.....	4,840.00 "	15.36	00.00 "
			57,920.00.00	202.41	21.04 "

Statement—Continued.

In what year located.	Number of warrants located.	Denomination of warrants located.	Number of acres represented.	Excess in area paid for with money.	Deficiencies in area.
Deduct deficiency			21.04.00 acres.		
Total number of acres covered with warrants			57,898.96 "		
	351	For 160 acres.	56,160.00 "		
	44	" 40 "	1,760.00 "		
	395		57,920.00 "		
Deduct deficiency			21.04 "		
Total number of acres covered with warrants, as above			57,898.96 "		

B.—*Acts of* 1850 *and* 1852.

Statement showing the No. of acres of land located at the Chariton land office with bounty land warrants issued under the act of 28th September, 1850, together with the No. of warrants of various grades, from the 30th March, 1853, to the 30th November, 1856, both days inclusive.

	Act of 1850.	No. of warrants.	Grade of warrants.	No. of acres represented.	Excess.	Deficiency.
From 30 March, 1853, to 29th March, 1854.	79	.....	160	12,640.00		
	449	.....	80	35,920.00		
	676	.....	40	27,040.00		
		1,204		75,600.00	446.35	102.56
Deduct deficiency				102.56		
				75,497.44	446.35	102.56
From 30th March, 1854, to 29th March, 1855.	115	.....	160	18,500		
	308	.....	80	24,640		
	420	.....	40	16,800		
		843		59,940	358.25	30.60
Deduct deficiency				30.60		
				59,909.40	358.25	30.60

Statement—Continued.

	Act of 1850.	No. of warrants.	Grade of warrants.	No. of acres represented.	Excess.	Deficiencies.
From 30th March, 1855, to 29th March, 1856.	109	.....	160	17,440		
	264	.....	80	21,120		
	330	.....	40	13,200		
		703		51,760	171.34	25.50
Deduct deficiency	.....	.....	.....	25.50		
				51,734.50	171.34	25.50
From 30th March, 1856, to 30th November, 1856, inclu.	13	.....	160	2,080		
	54	.....	80	4,320		
	74	.....	40	2,860		
		141		9,260	70.89	1.08
Deduct deficiency	.....	.....	.....	1.08		
				9,258.92	70.89	1.08
Recapitulation	316	.....	160	50,560		
	1,075	.....	80	86,000		

	1,500	.....	40	60,000	1,046.83	159.74
		2,891				
				196,560		
Deduct deficiency.....	.....	.....	.....	159.74		
				196,400.26	1,046.83	159.74

Statement—Continued.

Statement showing the No. of acres of land located at the Chariton land office with bounty land warrants issued under the act of 22d of March, 1852, together with the No. of warrants of various grades, from the 30th March, 1853, to the 30th November, 1856, both days inclusive.

	Act of 1852.	No. of warrants.	Grade of warrants.	No. of acres represented.	Excess.	Deficiency.
From 30th March, 1853, to 29th March, 1854.	21	.....	160	3,360		
	11	.....	80	880		
	70	.....	40	2,800		
		102		7,040	80.78	20.26
Deduct deficiency	.....	.....	.....	20.26		
				7,019.74	80.78	20.26
From 30th March, 1854, to 29th March, 1855.	8	.....	160	1,280		
	15	.....	80	1,200		
	50	.....	40	2,000		
		73		4,480		
From 30th March, 1855, to 29th March, 1856.	3	.....	160	480		
	4	.....	80	320		

	36	.....	40	1,440		
		43			44.92	5.74
				2,240		
Deduct deficiency.....	.....	.....	.....	5.74		
				2,234.26	44.92	5.74
From 30th March, 1856, to 30th Novem-	3	.....	80	240		
ber, 1856.	3	.....	40	120		
		6				
				360		
Recapitulation	32	.....	160	4,520		
	33	.....	80	2,640		
	162	.....	40	6,480		
		227			125.70	26.00
				13,640		
Deduct deficiency.....	.....	.....	.....	26.00		
				13,614.00	125.70	26.00

C.—Act of 1855.

Statement showing the number of acres of land located at the Chariton land office, with bounty land warrants, issued under the act of 3 March, 1855, together with the number of various grades from 30 March, 1855, to 29 March, 1856, both inclusive.

Period.	No. of warrants.	Grade of warrants.	No. of acres represented.	Deficiency.
1855.				
March				
April				
May				
June	2	160		
	37	120		
			4,760	
July	12	160		
	78	120		
	3	80		
			11,520	3
August	40	160		
	137	120		
	51	80		
			26,920	20.74
September	59	160		
	230	120		
	79	80		
			43,360	12.15
October	107	160		
	223	120		
	119	80		
			53,400	30.49
November	69	160		
	144	120		
	83	80		
			34,960	25.05
December	88	160		
	258	120		
	153	80		
	1	60		
	2	40		
			57,420	6.52
1856.				
January	25	160		
	91	120		
	79	80		
			21,240	13.02

Statement—Continued.

Period.	No. of warrants.	Grade of warrants.	No. of acres represented.	Deficiency.
February	51	160		
	171	120		
	100	80		
	1	60		
	1	40		
			36,780	20.69
March	123	160		
	438	120		
	218	80		
	1	40	89,720	88.14
	.....	.....	380,080	219.80
Deduct deficiency...	.....	.....	219.80	
		Acres ..	379,860.20	

Statement showing the number of acres of land located at the Chariton land office, with bounty land warrants, issued under the act of March 3, 1855, together with the number of warrants of various grades from 30 March, 1856, to 30 November 1856, both inclusive.

Period.	No. of warrants.	Grade of warrants.	No. of acres represented.	Deficiency.
1856.				
30 and 31 March...				
April	163	160		
	705	120		
	418	80		
	1	40		
			144,160	97.80
May	169	160		
	613	120		
	494	80		
	1	60		
	5	40		
			140,380	129.64

Statement—Continued.

Period.	No. of warrants.	Grade of warrants.	No. of acres represented.	Deficiency.
June	5	160		
	9	120		
	8	80		
	3	40		
			2,640	1.34
July	11	160		
	6	120		
	5	80		
			2,880	
August.....	10	160		
	5	120		
	5	80		
			2,600	3.68
September.....	6	160		
	6	120		
	1	80		
			1,760	
October	7	160		
	7	120		
	8	80		
			2,600	10.22
November	2	160		
	3	120		
	3	80	920	
			297,940	242.68
Deduct deficiency...	.....	.....	242.68	
		Acres ..	297,697.32	

Recapitulation from 30 *March*, 1855, *to* 29 *March*, 1856.

No. of warrants.	Grade of warrants.	No. of acres represented.	Deficiency.
576	160 acres.	92,160	
1,807	120 "	216,840	
885	80 "	70,800	
2	60 "	120	
4	40 "	160	219.80
		380,080	219.80
		219.80	
		379,860.20	

Recapitulation from 30 *March*, 1856 *to* 30 *November*, 1856.

No. of warrants.	Grade of warrants.	No. of acres represented.	Deficiency.
373	160 acres.	59,680	
1,354	120	162,480	
942	80	75,360	
1	60	60	
9	40	360	242.68
		297,940	
		242.68	
		297,697.32	

D.

Recapitulation under acts 1847, 1850, 1852, *and* 1855.

First official year, commencing 30 March, 1853, and ending 29 March, 1854.

	160	120	80	60	40	Fees received equal to one per cent. on land at $1.25 per acre.	Number of acres for which the warrants were relinquished.	Value of the lands at $1.25 per acre.
Act of 1827	116	.....	.....	.....	6	.....	18,791.16	
1850	79	.....	449	.....	676	.....	75,497.44	
1852	21	.....	11	.....	70	.....	7,019.74	
						$1,266.35	101,308.34	$126,635.42

Second official year, commencing 30 March, 1854, and ending 29 March, 1855.

Act of 1847	109	.....	.....	.....	21	.....	18,277.02	
1850	115	.....	308	.....	420	.....	59,909.40	
1852	8	.....	15	.....	50	.....	4,480	
						1,033.33	82,666.42	103,333.02

Third official year, commencing 30 March, 1855, and ending 29th March, 1856.

Act of 1847	96	.....	.....	.....	16	.....	15,989.78	
1850	109	.....	264	.....	330	.....	51,734.50	
1852	3	.....	4	.....	36	.....	2,234.26	
1855	576	1,807	885	2	4	.....	379,860.20	
						$5,622.73	449,818.74	$562,273.42

Fourth official year, commencing 30 March, 1856, and ending 30 November, 1856.

Act of 1847	30	.....	.....	.....	1	.....	4,840	
1850	13	.....	54	.....	74	.....	9,258.92	
1852	2	.....	3	.....	3	.....	360	
1855	373	1,354	940	1	9	.....	297,697.32	
						3,901.95	312,156.24	390,195.30

General Land Office, 30 May, 1857.

THOS. A. HENDRICKS,
Commissioner.

E.

Statement of Commissions earned by Robert Coles, Register of the Land Office at Chariton, Iowa, in each of his official years, on lands entered at land office; the Commissions paid to him; the Commissions due to him, and paid by Treasury warrant No. 4276; the Commissions to which he is entitled on the value of lands located by Military Bounty Land Warrants; the total amount of Commissions received by him; fees received for the location of Military Bounty Land Warrants, and the fees to be accounted for by him.

First official year, commencing 30th March, 1853, and ending 29th March, 1854.

Periods.	Lands entered.	Commissions earned by Register on lands entered.	Commissions of the Register on lands entered.		Commissions on locations earned by the Register.	Total commissions received.	Fees received.	Fees to be accounted for.
			Paid by Receiver.	Due to him.				
1853—30 and 31 March.	7,366 59	73 67	72 57	1 10				
qr. 2.	42,809 61	428 10	428 10	....	909 33	.....	1,266 35	357 02
qr. 3.	77,300 18	773 00	773 00	....				
1854—to 29 March.	31,590 12	315 90	143 64	170 26				
	159,066 50	1,590 67	1,419 31	171 36	909 33	2,500	1,26 635	357 02

Second official year, commencing 30 March, 1854, and ending 29 March, 1855.

1854—30 and 31 March.	2,257 27	22 57	22 55	02				
qr. 2.	183,461 18	1,834 61	1,815 48	19 13				
3.	159,826 07	1,598 26	148 03	494 79	.....	.....	1,033 33	1,033 33
4.	295,217 46	2,952 17	.....	.....				
1855—to 29 March.	77,404 18	774 04	.....	.....				
	718,166	7,181 65	1,986 06	513 94	.....	2,500	1,033 33	1,033 33

Third official year, commencing 30 March, 1855, and ending 29 March, 1856.

1855—30 and 31 March.	3,615 36	36 15	.....	36 15				
qr. 2.	287,083 40	2,870 83						
3.	144,700 54	1,447 01	2,089	374 85	.....	.....	5,622 73	5,622 73
4.	221,182 54	2,211 83						
1856—to 29 March.	51,996 89	519 97						
	708,578 73	7,085 79	2,089	411	.....	2,500	5,622 73	5,622 73

Statement—Continued.

Fourth official year, commencing 30th March, 1856, and ending 30 November, 1856.

Periods.	Lands entered.	Commissions earned by Register on lands entered.	Commissions of the Register on lands entered.		Commissions on locations earned by the Register.	Total commissions received.	Fees received.	Fees to be accounted for.
			Paid by Receiver.	Due to him.				
1856—30 and 31 March.								
qr. 2.	116,669 42	1,166 69	.....	1,166 69				
3.	2,280 23	22 80	.....	22 80	1,298 91	.....	3,901 95	2,603 04
To 30 November.	1,159 92	11 60	.....	11 60				
	120,109 57	1,201 09	.....	1,201 09	1,298 91	2,500	3,901 95	2,603 04

1 official year—Fees received by him.....	1,266 35	
Less commissions on locations allowed him sufficient to make his maximum compensation.....	909 33	357 02
2 official year—Fees received by him.....	1,033 33	
Having earned his maximum by commissions on lands entered, he is entitled to no commissions on locations.....	.....	1,033 33
3 official year—Fees received by him.....	5,622 73	

Having earned his maximum by commissions on lands entered, he is entitled to no commissions on lands located	.....	5,622 73
4 official year—Fees received by him	3,901 95	
Less commissions on locations allowed him to make his maximum compensation	1,298 91	
		2,603 04
		9,616 12
From which deduct amount of Treasury Interior warrant No. 4,276, dated 27th May, 1857, which issued in his favor for salary and commissions due him as follows:		
1 official year—Commissions	171 36	
2 " ditto	513 94	
3 " ditto	411	
4 " ditto	1,201 09	
Salary	332 88	
		2,630 27
Making of fees received by him, and to be accounted for, amounting to	.....	6,985 85

General Land Office, 30th May, 1857.

THOS. A. HENDRICKS,
Commissioner.

And your petitioner, the plaintiff, avers that the said sums of money, as set forth in said foregoing statements, (marked petition, page 8, petition, page 9, petition, page 10, petition, page 11, petition, page 12, and petition, page 13,) have been received by the said Coles, as such register, as set forth in said statement of account, and for the said fees as therein stated, and that the said Robert Coles has refused and still does refuse and neglect to pay the said sums so received, or any part of the same, to the plaintiff; but wrongfully and contrary to law, and in violation of the obligations of his said bond, and of the duties of his said office, still retains and keeps the same. The plaintiff avers that the said bond is its property, and the said sum of money shown as due the plaintiff from the said Robert Coles, is also its property. The plaintiff therefore asks judgment against the said defendants for said sum of money so shown to be due the said plaintiff from the said Robert Coles, by the said statement, and interest and costs. The defendants will take notice that the foregoing statement of the account of the said Robt. Coles with the plaintiff, with certificate thereunto attached, will be offered in evidence on the trial of said cause.

JOSEPH C. KNAPP,
Att'y of the U. S. for the Dist. of Iowa.

Filed May 1st, 1858.

J. C. BURNS, *Cl'k.*
By A. J. MESSENGER, *Deputy.*

Summons.

UNITED STATES OF AMERICA,
District of Iowa, ss.

To the Marshal of said district, greeting:

In the name of the President of the United States, we command you to summon Robert Coles, Henry B. Hendershott, Thos. G. Given and George Gillaspy, citizens of and resident in the State and district of Iowa, if they be found in your bailiwick, to be and appear before the district court of the United States for the district of Iowa aforesaid, at Burlington, in southern division of said district, on the 3d Monday in the month of May next, to answer unto the United States of America, of a plea of debt—debt, $10,000; damages, ten thousand dollars—and have then and there this writ.

Witness the Honorable J. M. Love, judge of said district court, this 6th day of October, 1857, and in the eighty-second [L. S.] year of the independence of United States of America.

Attest: JOHN C. BURNS, *Clerk.*

This writ came into my hands on the 12th day of November, 1857, and I have served the same, by reading said writ to Henry

B. Hendershott and George Gillaspy, and by delivering to each of them an attested copy of same on the 28th day of December, 1857, at the city of Ottumwa, Iowa, the said Thos. G. Given not found in my bailiwick; and I served the same on the said Robert Coles, by reading the same to him, on the 6th day of April, A. D. 1858, and by delivering to him an attested copy thereof, at Chariton, Iowa. No copy of other papers in the case demanded by any of said def'ts.

April 14th, 1858.

LAUREL SUMMERS,
U. S. Marshal.
By W. D. NEELY, *Deputy.*

Fees—Service on 3 def'ts.....	$6 00
Mileage, 150 miles.....	9 00
	$15 00

Filed May 18, 1858.

J. C. BURNS, *Clerk.*

Demurrer.

In the District Court of the United States for the district of Iowa, Southern division—Oct. Term, 1858.

UNITED STATES, Pl'ff,
vs.
ROBERT COLES and others, Def'ts.

And the said defendants, except Given, come and defend the wrong and injury, when, &c., and say that the plaintiffs their action aforesaid ought not to have or maintain against them, because they say that plaintiff's petition, and the matters and things therein contained, in manner and form as therein set forth, are not sufficient in law to enable plaintiff to have and maintain their said action, and this they are ready to verify.

Wherefore, they pray judgment of said petition, and if they shall further answer or plead thereto.

And for causes of demurrer defendants state the following:

1st. Said action is commenced by petition under the code of Iowa, whereas it should be by formal declaration as at common law.

2d. Plaintiff's petition does not show any substantial cause of action or right to recover, forasmuch as the fees and emoluments of office brought into account therein against defendants were, and are, in law, the rightful property of the defendant, Robert Coles, and for which he is not bound in law to account to the government of the United States.

DAVID RORER,
Att'y for Defendants, served.

Filed Oct. 19th, 1859.

J. C. BURNS, *Cl'k.*
By A. J. MESSENGER, *Deputy.*

United States District Court for the district of Iowa, Southern division—Wednesday, Oct. 20th, 1858.

THE UNITED STATES
vs.
ROBERT COLES et al. } Petition.

On this day this cause came on to be heard on defendants' demurrer to the petition of plaintiff, and the same having been argued by counsel, is taken under advisement by the court.

United States District Court for the district of Iowa, southern division.

Tuesday, Sept. 20, 1859.

THE UNITED STATES OF AMERICA
vs.
ROBERT COLES et al. } Petition on Bond.

And now on this day comes on this cause for hearing upon the demurrer of defendants to plaintiff's petition, the same having been held under advisement by the court for further argument of plaintiff's attorney; and the court having heard and seen the arguments of counsel, and being fully advised in the premises, orders that the said demurrer be sustained. It is therefore considered by the court that the plaintiff take nothing by its suit, and that the defendants go hence without day.

Know all men by these presents, that we, Charles Mason and William Patterson, of the State of Iowa, are held and firmly bound unto Robert Coles, of said State, in the full and just sum of five thousand dollars, to be paid to the said Robert Coles, his certain attorney, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas, lately, at a session of the district court of the United States for the first district of Iowa, in a suit depending in said court between the United States of America and the said Robert Coles, judgment was rendered against the said United States, and the said United States having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the in the aforesaid suit, and a citation directed to the said Robert Coles, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the Monday of December next:

Now the condition of the above obligation is such, that if the said United States of America shall prosecute said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

CHARLES MASON, [SEAL.]
WM. PATTERSON. [SEAL.]
[SEAL.]

Sealed and delivered in presence of—

Approved by J. M. LOVE, *Judge.*

UNITED STATES OF AMERICA, *ss.*

The United States of America to the Honorable the Judge of the District Court of the United States for the district of Iowa, southern division, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between the United States of America and Robert Coles, a manifest error hath happened, to the great damage of the said United States, as by their complaint appears: We are willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, and therefore do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, this first Monday of December, in the year of our Lord one thousand eight hundred and fifty-eight.

Clerk of the Supreme Court of the United States.

Allowed by J. M. LOVE, *Judge.*

Filed Sept. 30, 1859.

J. C. BURNS, *Clerk.*
By A. T. WALLING,
Deputy.

United States of America to Robert Coles, of Lucas county, in the State of Iowa, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the district of Iowa, southern division, wherein the United States of America are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and fifty-eight.

J. M. LOVE,
Judge D. C. U. S., Dist. of Iowa.

BURLINGTON, *October* 18, 1859.

I hereby accept service of the within citation on me, as the defendant in error therein named.

R. COLES.

Filed Oct. 31, 1859.

J. C. BURNS, *Clerk.*
By A. T. WALLING,
Deputy.

Clerk's Office District Court of the United States for the district of Iowa, southern division.

I, J. C. Burns, clerk of said court, hereby certify that the foregoing is a true copy of the record, to which is attached the original writ of error and citation and copy of the bond, now on file in the clerk's office of said court, at Keokuk, Iowa, in the case of the United States of America vs. Robert Coles and others.

Witness my hand and the seal of said court, this 23d day of December, A. D. 1859, and of the independence the 84th year.
[L. S.]

J. C. BURNS, *Clerk.*
By A. T. WALLING,
Deputy.

Filed 4th January, 1860.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES

VS.

LYANDER W. BABBIT,

AND

THE UNITED STATES

VS.

ROBERT COLES,

BRIEF OF PLAINTIFF IN ERROR.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1861.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES *vs.* LYSANDER W. BABBITT. } Error to the district court of the United States for the district of Iowa, No. 90.

THE UNITED STATES *vs.* ROBERT COLES. } Error to the district court of the United States for the district of Iowa, No. 91.

The above-named cases present the same questions, and may therefore be considered and argued together.

To May term, 1858, of the United States district court for the district of Iowa, the United States brought suit against Lysander W. Babbitt and others, on the bond of the said Babbitt as register of the land office at Kanesville, Iowa, and against Robert Coles and others, on the bond of the said Coles as register of the land office at Chariton, Iowa.

Babbitt was commissioned from the 6th day of April, 1853, and held his office from that date until the 20th day of October, 1856, to which time his accounts were adjusted by the accounting officers, showing a balance against him of $9,816 24, which he neglected and refused to account for. This amount consisted of fees received by him for locating military bounty land warrants under the acts of February 11, 1847; September 25, 1850; March 22, 1852, and March 3, 1855. It is contended by the United States that these fees, having been received by him in excess of his maximum of commissions on lands, are justly due and payable to her treasury, and to recover the amount thereof this suit was brought.

Coles was commissioned from the 30th of March, 1853, and held his office from that date until the 30th of November, 1856, to which time his accounts were adjusted by the accounting officers, showing a balance against him of $11,824 36, which he neglected and refused to account for. This amount also consisted of fees received by him for locating military bounty land warrants under the acts of 1847,

1850, 1852, and 1855. It is likewise contended by the United States in this case, that these fees, having been received in excess of his maximum of commissions on lands, should be paid into the treasury, and in default thereof the suit was brought.

In both cases the defendants demurred to the action, and for cause alleged—

1st. That the action was informally commenced; and,

2d. That the fees exhibited in the said account are in law the rightful property of the defendant, for which he is not bound to account to the United States.

Which demurrer was sustained by the court, and judgment in both cases entered for the defendants.

Whereupon the plaintiff sued out writs of error.

Argument for the plaintiff in error.

It will be convenient to consider the second point of the defendants' demurrer first, as it presents the only ground of substance in the case, the first point being merely as to the form of the proceedings, and not touching the cause of action.

It is contended, on behalf of the plaintiff, that the court erred in refusing to enter a judgment against the defendants in these cases for the amount of the balances found respectively against them, because they had already received the whole amount of compensation to which they were entitled by law. The defendants, on the other hand, allege that, under the acts of Congress regulating their compensation, they were entitled to retain all the fees received by them for commissions on locations of military bounty lands.

The compensation of registers of the land office is fixed by the act of April 20, 1818, (3 St., 466,) the second section of which declares "that instead of the compensation now allowed by law to the registers of the land office, they shall receive an annual salary of five hundred dollars each, and a commission of one per centum on all the moneys expressed in the receipts by them filed and entered, and of which they shall have transmitted an account to the Secretary of the Treasury: *Provided always*, That the whole amount which any register of the land office shall receive under the provisions of this act shall not exceed, for any one year, the sum of three thousand dollars."

It has not been denied that this act fixes the limit of the commis-

sions of registers on entries of public lands under the laws which provide for their sale; but it is alleged by the defendants in these cases that, under the acts of Congress which authorize the issue of military bounty warrants and their location on the public lands, they are entitled to retain for their own use the fees required to be paid by those acts, even when in excess of the maximum of $2,500 per annum, the act of 1818 not standing in their way. The money for which these defendants refuse to account having been received by them as fees under these military bounty laws, in addition to their maximum compensation, they accordingly claim to retain it in pursuance of their provisions.

The question to be decided in these cases, therefore, is, whether the military bounty land laws allow registers to retain, for their own compensation, the percentage received from the location of military bounty land, in excess of the maximum prescribed by the act of 1818.

It is submitted, on behalf of the plaintiff, that a review of these military bounty land acts will conclusively show that Congress intended that the restriction upon the compensation of registers contained in the proviso to the second section of the act of April 20, 1818, above quoted, should apply to the compensation received for locating bounty lands under these acts.

It will be observed that the percentage received and retained by the defendants in these cases, accrued under four different acts.

Babbitt received, during his term of office, under the act of February 11, 1847, fees on 38,728.19 acres; under the act of September 28, 1850, fees on 113,754.53 acres; under the act of March 22, 1852, fees on 9,147 acres; under the act of March 3, 1855, fees on 948,697.37 acres.

Coles received, during his term of office, under the act of February 11, 1847, fees on 57,897.96 acres; under the act of September 28, 1850, fees on 196,400.26 acres; under the act of March 22, 1852, fees on 14,094 acres; under the act of March 3, 1855, fees on 677,557.52 acres.

The fees received by Babbitt and Coles during their first two years in office, were received under the acts of 1847, 1850, and 1852, the act of 1855 not being then in existence. It follows that, even if the act of 1855 should be held to authorize registers to retain fees received under its provisions in excess of the maximum established by

the act of 1818, it can afford no justification for the retention of fees received under the acts of 1847, 1850, and 1852. Whatever may be the construction of the act of 1855, the excess of percentage received by the defendants under the former acts must be accounted for to the plaintiff, unless some provision can be found in those acts to authorize its retention. And if no such provision can be found, the percentage received under those acts *after* the passage of the act of 1855, must also be accounted for, unless that act confers the right to retain it. It becomes necessary, therefore, to discriminate between the percentage received under these acts, and to find for the retention of each some statutory authority. The court below blended all in one common mass, without any discrimination; and if it shall be found that the percentage received under any one of the acts named is subject to the general limitation of the act of 1818, the judgment of the court must be reversed.

The first act under which this percentage was received by the defendants, is the act of February 11, 1847, (9 Stat., 125,) which gives to certain non-commissioned officers, musicians, and privates in the Mexican war, one hundred and sixty acres of land. The act contains no provision for fees, but the act of May 17, 1848, (9 Stat., 231,) authorized registers and receivers, for services rendered in carrying out the provisions of the act of 1847, to require from the holders of warrants issued thereunder, for 160 acres, the sum of fifty cents, and for 40 acres the sum of twenty-five cents each, in full compensation for their services, with the proviso, that where the warrant was located for the use of the soldier to whom it issued, no compensation should be charged.

It is unnecessary to inquire whether Congress intended that these fees, which were only a tax on the assignees of warrants, should be in addition to the commissions of registers, where those commissions reached the maximum prescribed by the act of 1818, because the act of 1848 was modified by the act of March 22, 1852, (hereinafter referred to,) and the defendants received no fees under its provisions.

The next act under which the defendants received this percentage is the act of September 28, 1850, (9 Stat., 520,) which authorized the issue of bounty land warrants to the soldiers who performed military service in the war of 1812, or in any of the Indian wars since 1790, and to the commissioned officers of the Mexican war. This act made

no provision for fees, but, on the contrary, directed the locations to be made "free of expense."

By the fourth section of the act of 22d March, 1852, (10 Stat., 4,) the benefits of the act of 1850 were extended to all cases where the militia or volunteers of any State or Territory were called into military service and paid by the United States subsequent to the 18th of June, 1812. This is the third act under which the defendants received the percentage in question.

The second and third sections of the act of 22d March, 1852, contain the provisions which authorize registers and receivers to charge and receive compensation for locating military bounty land warrants, and are as follows:

"SEC. 2. That the registers and receivers of the land office shall hereafter be severally authorized to charge and receive for their services, in locating all military bounty land warrants issued since the 11th day of February, 1847, the same compensation or percentage to which they are entitled by law for sales of public lands for cash, at the rate of $1 25 per acre, the said compensation to be hereafter paid by the assignees or holders of such warrants.

"SEC. 3. That registers and receivers, whether in or out of office at the passage of this act, or their legal representatives, in case of death, shall be entitled to receive from the treasury of the United States, for services heretofore performed in locating military bounty land warrants, the same rate of compensation provided in the preceding section for services hereafter to be performed, after deducting the amount already received by such officers under the act entitled 'An act to require the holders of military land warrants to compensate the land officers,' &c., approved May 17, 1848: *Provided*, That no register or receiver shall receive any compensation out of the treasury for past services, who has charged and received illegal fees for the location of such warrants: *And provided further*, That no register or receiver shall receive for his services, during any year, a greater compensation than the maximum now allowed by law."

Such were the provisions of law under which registers acted in the location of military bounty lands, and charged and received fees therefor, when these defendants entered into office, and for the first two years of their official life these acts furnished the only rules of action on the subject. For the retention of the percentage in excess

of "the maximum allowed by law" received during those two years, as exhibited in the evidence, a justification must be found in the acts above cited, or it does not exist.

Do these acts bear such a construction?

The act of 1818, authorizing registers to receive a commission of one per centum on the moneys expressed in their receipts, (in addition to an annual salary of $500,) and limiting the maximum of commissions, with the salary, to $3,000 per annum, unquestionably established the general rule by which the compensation of these officers is ascertained and fixed. Its effect was to limit their commissions on lands to $2,500 per annum, and to establish a uniform compensation—a policy which all the legislation on the subject, subsequent to this act, shows Congress to have cherished. These commissions accrued upon lands entered with the registers; and under the law, all beyond the maximum went into the national treasury. When the military bounty land laws of 1847 and 1850 were passed, no compensation was allowed for locating lands thereunder, except the small fee exacted under the act of May, 17, 1848, (supra,) from assignees. But when the right to bounty lands was extended by the act of March 22, 1852, Congress, by the sections above quoted, subjected the holders of all military bounty land warrants to the payment of the same compensation or percentage to registers and receivers "to which they" were "entitled *by law* for sales of public lands for cash." The law here referred to is of course the act of 1818, that being the only law which fixed the amount of percentage to which these officers were entitled; and at the close of the third section is inserted the proviso limiting the compensation to be received by registers and receivers for their services to "the maximum now allowed by law," being the maximum established by the act of 1818.

If this proviso applies to the fees received by registers and receivers under the second section of the act, then the judgment of the court below in these cases must be reversed, for it directly prohibits the retention of compensation in excess of the maximum on military bounty warrants issued under the then existing laws, which were the acts of 1847, 1850, and 1852.

But it is said that the proviso, being at the end of the third section, does not apply to the second section. Even if it did not, I think the fair construction of the second section is, that the right given to registers and receivers to charge and receive the compensation or

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percentage prescribed by the act of 1818 is subject to the limitation of a maximum in that act.

But it is clear that Congress meant to apply the proviso both to the second and third sections. These sections, although in form two, are in effect but one. The proviso is appropriate to both, and was evidently inserted at the end of the third section to avoid repetition. The purpose of the proviso is the same as that of the act of 1818, to which it refers, viz: to prohibit the exorbitant compensation which the allowance of the percentage on all the warrants located would give to registers and receivers in large and thriving districts, and to preserve the uniformity of compensation to these officers. The reasons which prompted Congress to limit the percentage of registers on land entries in 1818 existed in stronger force to induce its restriction on bounty locations in 1852, for the great rapidity with which locations have been made within the last twenty years, furnished Congress an additional reason for preventing the accumulation of enormous fees within a shorter time for the benefit of one man.

Striking evidence that Congress intended this proviso to apply to the second section, and to limit the compensation of registers and receivers to the legal maximum, is furnished by that clause in the civil and diplomatic appropriation act of March 3, 1853, (10 Stat., 204,) which makes the usual appropriation for the salaries and commissions of registers and receivers. Attached to it is this *proviso:* "That whenever the amount received at any United States land office, under the third section of an act entitled 'An act to make land warrants assignable, and for other purposes.' approved March 22, 1852, has exceeded or shall exceed the amount which the registers and receivers at any such office are entitled to receive under said third section, the surplus which shall remain, after paying the amount so due as aforesaid to said registers and receivers, shall be paid into the treasury of the United States as other public moneys."

It is perfectly clear that this proviso was not meant to apply to the third section, which by some clerical error is named, but to the second section. As applied to the third section it is grossly absurd. Congress could not have meant to enact that whenever the amount received at a land office *from the treasury of the United States for services theretofore performed* shall exceed the amount which registers and receivers are entitled to receive under the third section, (which is by the last proviso to that section limited to the maximum of

$2,500,) that the surplus which should remain after paying the amount due to said registers and receivers, should be paid into the treasury of the United States as other public moneys. Such an enactment would be a hopeless absurdity, and yet that is its effect if meant to apply to the third section. But as applied to the second section, it means that whenever the amount received at any land office for services in locating military bounty land warrants, as authorized to be charged by the second section of the act of March 22, 1852, has exceeded or shall exceed the amount which registers and receivers are entitled to receive under the third section of that act, (as limited in the last proviso,) the surplus which shall remain after paying that amount to said registers and receivers shall be paid into the treasury. This construction is consistent and natural, and that it expresses the congressional meaning no man can doubt.

It is evident that the literal reading of the proviso does not express its true meaning, and it is therefore only by reading it in connexion with both the second and third sections of the act of 1852 and the act of 1818, to which it obviously refers, that its precise meaning can be extracted. As was said by Mr. Justice Washington, in Fisher *vs.* Blight, 2 Cranch, 399: "If, from a view of the whole law, or from other laws in *pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the legislature." "So, if the literal expressions of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid such consequences, if from the whole purview of the law, and giving effect to the words used, it may fairly be done."—(Page 400.)

Thus explained, the proviso to the act of 1853, and the second and third sections of the act of 1852, declared the law in relation to the compensation of registers and receivers to be, that they might charge and receive for their services in locating military bounty land warrants, issued under the law then existing, after February 11, 1847, the same compensation or percentage to which they were entitled by law for sales of the public lands for cash, (which, under the act of 1818, is one per centum,) to be paid by the assignees or holders of such warrants; but that they should not receive for their services in any year more than the maximum then allowed by law, (which, under

the act of 1818, is $2,500, and a salary of $500,) and that whenever the amount received should exceed that sum, the surplus should be be paid into the national treasury.

And this construction accords with the well-settled policy of Congress to limit the compensation of these officers to that maximum or less. Thus, the act of March 3, 1855, (10 Stat., 635,) while authorizing registers and receivers to receive the same amount of pay for entries of land under the act of August 4, 1854, (which graduates and reduces the price of lands to actual settlers,) also provides that the whole amount received per year shall in no case exceed the limitation fixed by existing laws. And so, by the act of March 3, 1853, (10 Stat., 245,) the salaries of these officers in California are fixed at $3,000 each, and they are prohibited from receiving any percentage or fees, except for deciding pre-emption cases; and so the act of July 17, 1854, (10 Stat., 306,) limits the salaries of the registers and receivers of Oregon and Washington Territories each to $2,500 per annum and office rent, and prohibits them from receiving fees or emoluments of any kind, except the receiver's necessary expenses for depositing moneys; and the act of July 12, 1858, (11 Stat., 325,) gives the same compensation to registers and receivers in New Mexico which those officers receive in Washington Territory, with a proviso that their compensation, including fees, shall not exceed $3,000 each per annum.

If this construction, thus sustained by a comparison of the statutes themselves and by settled policy, be correct, it follows that the United States should have recovered in these cases the amount of the fees received by the defendants, in excess of the maximum which accrued upon the location of bounty land warrants under the acts of February 11, 1847, September 28, 1850, and March 22, 1852, and that the judgments for the defendants are therefore erroneous.

2. The residue, and much the largest part of the percentage received and retained by the defendants in these cases, in excess of the maximum allowed by law, as appears by the record, accrued under the military bounty land act of 3d March, 1855, (10 Stat., 701.) Under this act there was located in the district wherein Babbitt was register, during his official term, from the 8th of June, 1855, to the 20th of October, 1856, inclusive, 948,697 acres; and in Cole's district, during his official term, from June, 1855, to the 30th Novem-

ber, 1856, inclusive, 677,557 acres, on all of which they received the percentage allowed by the act of 1818 in excess of the legal maximum.

It is submitted that the just construction of the act of 1855, like that of the act of 1852, is, that the percentage authorized to be charged and received under its provisions by registers and receivers, is subject to the limitation of the maximum imposed by the act of 1818, and therefore, that the district court erred also in deciding that the defendants were entitled to retain the amount claimed in these cases.

The first section of the act of 1855 authorizes the issue of a warrant for one hundred and sixty acres to each of the officers, musicians, and privates of regulars, volunteers, &c., regularly mustered into service, and to every officer, seaman, &c., in the navy, in any of our wars since 1790, and to the State troops paid by the United States, and to the widow or minor child of any such who may be deceased.

The sixth section enacts "that registers and receivers of the several land offices, shall be severally authorized to charge and receive for their services in locating all warrants under the provisions of this act, the same compensation or percentage to which they are entitled by law for sales of the public lands, for cash, at the rate of one dollar and twenty-five cents per acre, the said compensation to be paid by the assignees or holders of such warrants."

We have seen that in the legislation prior to this act, the well-settled, and, with unimportant exceptions, the uniform practice of Congress was to limit the compensation of registers and receivers to a fixed amount, whether for services in the entry of public lands for cash, or in the location of military bounty land warrants; and it was only by the adoption of such a system that Congress could enforce the policy of requiring public officers to account for and pay into the treasury all the public moneys they received, and of compelling them to draw their compensation from the treasury under, and in pursuance of annual specific appropriations for that purpose. The method by which this is effected is indicated in the act of March 3, 1849, (9 St., 398,) the first section of which requires that the gross amount of all duties received from customs, from the sales of public lands, and from miscellaneous sources, for the use of the United States, shall be paid by the officer receiving the same into the treasury as early as practicable, without any abatement or deduction on account of salary, fees,

costs, charges, expenses, or claim of any description whatever, without altering the laws which regulate the collection of post office revenue. The third section makes it the duty of the Secretary of the Treasury to submit to Congress at the opening of each session, from year to year, estimates of appropriations which may be required to provide for the expenses of collecting the revenue from customs and from the public lands—in accordance with which, annual appropriations for the salaries of registers and receivers have regularly been made by Congress. If the true construction of the act of 1855 be, that registers and receivers are to charge and receive for their own benefit the percentage allowed by the sixth section, it has repealed the act just cited, so far as the collection of that percentage is concerned. For if these officers retain each year all of that percentage, the statutory requirement that all moneys from the sales of public lands or miscellaneous sources shall be paid into the treasury is not complied with. But even if, in obedience thereto, it should be paid into the treasury, and the whole of it be still payable to the register or receiver, it will be impossible that the amount can be returned to him in pursuance of annual appropriations. The purpose of the act of 1849 clearly is, that all public officers shall receive their salaries or emoluments of office through an annual appropriation therefor. If the register or receiver is entitled to the uncertain and varying amount of the percentage on bounty warrants, Congress cannot make an annual appropriation of that amount to him in advance, (as these appropriations are made,) for what the amount will be cannot possibly be anticipated. This construction, therefore, practically repeals the act of 1849, which certainly could not have been the intention of Congress.

It thus uproots the policy of limiting official compensation to a *certain* sum. It also affords the first instance of departure from the equally well-established policy of restraining that compensation to a *reasonable* sum. There is no single reason that justifies the limitation of the compensation of registers and receivers to $3,000 per annum for their other official duties, that does not apply with like force to its limitation for services under all of the bounty land acts. We have seen that in some instances, as in California, Washington, New Mexico, and Oregon, the compensation is limited by express enactment. Officers in those places are certainly prohibited from retaining the percentage allowed by the bounty land laws, and yet the construction claimed for the defendants would give it to some registers and re-

ceivers, while they would be deprived of it. It is submitted that the act of 1855 could have intended no such anomaly.

But construing the act of 1855 and the preceding acts in *pari materia*, and in harmony with each other, they establish a system natural and consistent, and in accordance with the policy of Congress. Thus construed, the effect of these acts is to place the compensation of registers and receivers on a common level, raising it for the location of bounty lands in small districts to the legal maximum, and restraining it for these services within the same limits in larger districts, in which, without the restriction, it would amount to a sum far beyond the compensation received by the President of the United States.

But that Congress intended that the authority conferred by the sixth section of the act of 1855, to charge and receive the usual percentage for locating warrants, should be subject to the limitation which exists on the whole compensation of registers and receivers, is evident from subsequent legislation. It was well known that the passage of the bounty land act of 1855, would induce the location of a large quantity of public land, and thereby render necessary a larger clerical force in the offices of registers and receivers. If Congress had intended that all of the percentage on those locations should go to those officers, they would very properly have considered the increased compensation as affording abundant means of employing such additional clerical force. Yet in the general appropriation act of August 18, 1856, section 7, (11 St., 91,) it was enacted, "That, in the settlement of the accounts of registers and receivers of the public land offices, the Secretary of the Interior be authorized to allow, subject to the approval of Congress, such reasonable compensation for additional clerical services and extraordinary expenses incident to said offices as he shall think just and proper, and report to Congress all such cases of allowance at each succeeding session, with estimates of the sum or sums required to pay the same."

It is impossible to believe that Congress intended that registers and receivers should not only retain the percentage under the act of 1855, without limitation, for their own benefit, (amounting, as in the cases before the court, to thousands of dollars per annum,) and also that "the additional clerical services and extraordinary expenses" involved in the discharge of their duties under that act should be paid by the government. The act of 1856, just cited, passed in consequence

of the new duties imposed by the act of 1855, is an expression of the legislative meaning of that act, and is utterly inconsistent with the construction claimed for it by the defendants. It is also a legislative recognition of the correctness of the construction and decision of the land office, which, as appears by its circular of January 26, 1856, and other circulars to registers and receivers, limited their annual compensation "to $500 as salary and $2,500 as commissions."

It will be observed that the sixth section of the act of 1855 is almost a transcript of the second section of the act of March 22, 1852, before cited, (page 5.) The act of 1855 authorizes the charge of percentage for locating warrants only under its own provisions, and it may here be remarked that it therefore cannot, under any circumstances, be held to justify the retention of the percentage for locating warrants under the acts of 1847, 1850, and 1852—an error into which the court below seems to have fallen.

The one section being thus copied from the other, it was evidently the purpose of Congress to establish the same rule of compensation for services in locating warrants under the act of 1855, as that which already existed under the act of 1852, for locating warrants under it and prior statutes. They (registers and receivers) are to charge and receive for their services in locating warrants the same compensation or percentage to which they are entitled by law for cash sales. What is "the same compensation" thus referred to? It is the compensation fixed by the act of 1818, which is one per centum on the cash value of the warrant at $1 25 per acre, subject to the limitation of a maximum fixed in that act. They are therefore authorized to charge and receive one per centum on the cash value of the warrants located, the treasury receiving all in excess of their salary, and $2,500 per annum. Both the acts of 1852 and 1855 having established the rate of compensation already fixed by law, which law is the act of 1818, it is submitted that that rate of compensation must be adopted with the restriction of a maximum contained in it. The rate of compensation fixed by the act of 1818 is not merely a commission of one per centum, but a commission of one per centum up to a certain amount, the proviso which limits the commission which the officer is to receive, being as operative in establishing the rate of compensation as any other part of the law. The acts of 1852 and 1855, therefore, in giving these officers the compensation fixed by the act of 1818, incorporated the proviso to that act in their provisions just as much as they

incorporated therein that part of the act of 1818, which fixed the commission at one per centum.

The result of this construction is, that the various statutes concerning the compensation of registers and receivers not only, as has been suggested, harmonize with each other, but accord with the wise policy, before referred to, of regulating the compensation of the same classes of public officers by a uniform standard; of limiting it to a certain and reasonable amount, and of requiring all public moneys they receive to be paid into the treasury, and their own compensation to be paid them only in pursuance of annual appropriations for that purpose.

That the limitation of commissions to a maximum of $2,500 per annum, as fixed in the act of 1818, was intended to operate on the laws authorizing a charge of percentage for locating military bounty warrants as above contended, is further proved by the fact that Congress, by the act of February 2, 1859, (St., 378,) declared such to be its true construction. To avoid all further question on the subject, Congress by that act declared that the act of 1818 should be so construed as to restrict the aggregate amount allowed as compensation for the register's and receiver's commissions on moneys received at any land office, in any one calendar year, to the sum of $2,500 each. That Congress did not mean to enact a new rule, but to remove doubt as to the meaning of an existing one, is indicated by the form of the act construing, but not amending, or changing the act of 1818.

It is also worthy of consideration that ever since 1852 the proper executive departments of the government have construed these acts in accordance with the view herein suggested, and all the accounts of registers and receivers have heretofore been settled on that basis. This construction was adopted, and continued, in obedience to the opinions of President Pierce and Attorney General Cushing, and of all the Secretaries of the Interior since that time. If the judgment of the district court shall be sustained, the practice of the government during ten years will be reversed, and great confusion introduced into the accounting offices.

II. The ground of demurrer first alleged in these cases is insufficiency of form. It is contended that, for reasons hereafter stated, these grounds of demurrer could not have been considered by the court below, and therefore are not properly before this court for adjudica-

tion; but as they may be relied on by the defendants in error, a few suggestions in regard to them are submitted.

In Babbitt's case, the objection is in these words—

"1st. That the form of said petition is such as by law said plaintiff cannot recover or maintain an action.

"2. The pleading does not designate a cause of action in form."

In the case of Coles it is alleged—

"1st. Said action is commenced by petition under the code of Iowa, whereas it should be by formal declaration as at common law."

These objections being to form, the demurrers which embody them must be *special* and not general, and, as is required by the 27th Eliz., c. 5, and the 4th and 5th Anne, c. 16, must point out, or, in the words of the statute, "specially and particularly set down and express" the "imperfection, defect, or want of form in the writ, return, plaint, declaration, or other pleading," as causes of demurrer, and if this be not done, judgment must be given "according as the very right of the cause and matter in law shall appear." (1 Chit., Pl. 663–4.)

It is not sufficient, under these statutes, that the demurrer should object in general terms that the pleading is "uncertain, defective, informal," or the like; but it is necessary to show *in what respect* uncertain, defective, or informal. (Steph. Pl., 142; 1 Saund., 161, N. 1.) As is said in 1 Saund., 337 b., note 3, "the statute 27 Eliz., obliges the party *to lay his finger on the very point.*" The discovery of informality must not be confused and obscure, but special, and the demurrer must express what is the point and specialty of the form required. (Hob., 232.)

Tested by these principles the demurrers in these cases are fatally defective.

Babbitt's demurrer complains "that the form of the petition" is defective, and that "the pleading does not designate a cause of action in form;" but it does not pretend to point out in what respect it is informal or insufficient. It is impossible for the plaintiff or the court to learn from the demurrer where the defect, if any, is to be found. It amounts precisely to the objection that the pleading is informal, which, as we have seen by the authorities cited, is not sufficient.

The demurrer of Coles is quite as defective and insufficient. It objects that the action is commenced by petition under the Iowa code, and not by formal declaration at common law. An action at common

law is not commenced by a declaration. At common law all actions were commenced by *original writ*, and they are now commenced by writ of *summons* or *capias*. In this case (as in that of Babbitt also) it is commenced by summons in an action of debt.

But even assuming that this demurrer means to allege, as informality, that the plaintiff's declaration is not sufficient in law, it fails to point out the defect or insufficiency complained of. Here also it is impossible to learn from the demurrer where the informality is to be found.

A second answer to these demurrers for form is, that they should have been urged, if urged at all, as pleas in abatement. They go not to the cause of action, but to the mode of proceeding, and if they are well founded, their operation should be to defeat, not the plaintiff's claim, but the particular remedy he has chosen, leaving him free to adopt another. But the judgments in these cases are final, operating, if allowed to stand, as a bar to any other action on the same claim. This could not be the judgment entered, where the objection reached the remedy and not the cause of action. The records here do not show the judgments to have been entered on the points of form suggested in the demurrers, but entered generally, and therefore this court is bound to assume that they were entered on the last point presented in each demurrer, which is of *substance* and not of form. The court below could hardly have meant to pronounce a final judgment against the plaintiff, operating as a bar to any other action for the same cause, on the ground that we had adopted an improper remedy, and yet such is the result if the judgments are to be treated as an adjudication of the point of form suggested in the demurrers. The conclusion, therefore, is irresistible, that no judgment was pronounced by the district court on the first ground of demurrer, and, not having been passed on, the question of the insufficiency of the plaintiff's form of action or method of proceeding is not before this court.

But even if this court should be of opinion that the demurrers for matter of form are well taken, the plaintiff is entitled to have such a judgment pronounced as will not bar a second suit on the same claim, and therefore these judgments should be reversed, and the records remitted for the entry of judgment in the proper form.

The rule by which matter of form is distinguished from matter of substance is, that where the defect in the pleading is such that no

right appears, it is matter of substance; but where the defect still leaves the right apparent, it is of form. (Heard *vs.* Baskerville, Hob., 232.) According to this rule, the ground of demurrer first presented by the defendants in this case is purely formal, for the declaration or statement of the cause of action in both cases sets out with singular fullness and minuteness the grounds of the suits. There is no formality of a declaration at common law wanting, unless it be in the commencement, and it has been held that an inaccuracy in the form of commencing a declaration is not ground of demurrer. (1 Ch. Pl., 662; 3 Ch. Gen. Prac., 468, and cases cited.) All the requisites of a declaration at common law are found, and if this court should even be of opinion that an action cannot be prosecuted in the district court of Iowa according to the forms of the Iowa code, they will hardly affirm these judgments on the ground that the statements of the cause of action do not commence with a videlicet and end with the proffer of John Doe and Richard Roe as pledges.

It will be difficult for the defendants in error to show that the courts of the United States are compelled to abide by the fading and almost obsolete forms of the common law in the conduct of suits. The forms used are commonly those which prevail in the States to which their jurisdiction attaches, with the single restriction that they shall not be repugnant to the laws of the United States. Nothing in the statement of the cause of action in these cases, or in any part of the form of remedy adopted, can be said to contravene those laws; and therefore, even if the question had been properly raised and formally decided in the court below, it is submitted that these records show nothing to sustain such ground of demurrer.

Courts of justice do not look with favor on demurrers for matter of form, especially where there are merits to be tried, and the day has gone by when an honest claim can be defeated by a technical objection to the form in which it is presented, unless, indeed, the informality affect it in some essential matter.

EDWARD BATES,
Attorney General.

SUPREME COURT OF THE UNITED STATES.

Nos. 90 & 91.—December Term, 1861.

LYSANDER W. BABBITT AND OTHERS, DEFENDANTS IN ERROR,

ad.

THE UNITED STATES, PLAINTIFFS IN ERROR.

ROBERT COLES AND OTHERS, DEFENDANTS IN ERROR,

ad.

THE UNITED STATES, PLAINTIFFS IN ERROR.

Brief for the Defendants in Error.

ERROR TO THE DISTRICT COURT OF IOWA.

These two cases are, in all essential particulars, alike, and therefore they are treated as one; and the facts, proceedings, and judgment of but one are herein stated.

The complaint states that Babbitt was appointed a register of the land office at Kanesville, Iowa, on the 9th day of May, 1853, and that he and the other defendants entered into a bond, as his sureties, for the faithful performance of his duties as such register.

The bond and accounts under it are set out at length; and the complaint then avers that said Babbitt received certain fees, as such register, which he was bound to account for and pay over to the United States, which he refused to do.

These accounts show that the fees referred to arose and were claimed for services in entering certain bounty land warrants, and which Babbitt claimed he was entitled to retain.

He demurred to the complaint, and judgment was rendered in his favor.

Geo. S. Gideon, printer, 511 Ninth street, Washington D. C.

These fees were received under the acts of the 11th of February, 1847, (9 U. S. L., 125;) act of 28th September, 1850, (9 U. S. L., 520;) act of 22d March, 1852, (10 U. S. L., 4;) and act of 3d of March, 1855, (10 U. S. L., 635;) and amounting in all to the sum of $9,816 24.

The question is, whether these fees belong to the Government or to the defendants?

This involves the construction of the acts relating to the fees of registers of land offices.

The plaintiffs contend that the registers are, in all cases, limited to $2,500 in fees and a salary of $500.

The defendants insists that, under the bounty law acts, and those relating to bounty land warrants, there is no such limitation, and that he is entitled to retain, for his own use, the whole amount of compensation which the laws authorized him to receive.

The consideration of this question will involve a reference to numerous acts of Congress relating to the subject.

By the act of the 10th of May, 1800, (2 U. S. L., 77, § 12,) the registers were entitled to receive from the treasury one-half of one per cent. on all moneys expressed in the receipts filed by them, and certain fees, to be paid by the purchasers, for their own use, varying from twenty-five cents to three dollars.

By the act of the 26th of March, 1804, (2 U. S. L., 282, § 14,) additional compensation was provided, of one-half of one per cent., on all moneys paid for lands, and a salary of $500, and certain provisions, authorizing fees for entry and certificates for money paid, were repealed. The same act abolished the fees paid to the Government for patents.

Then came the act of the 20th of April, 1818, (3 U. S. L., 466, § 2,) which provides:

"That instead of the compensation now allowed by law to the registers of the land offices, they shall receive an annual salary of five hundred dollars each, and a commission of one per centum on all moneys *expressed in the receipts by them filed and entered, and of which they shall have transmitted an account to the Secretary of the Treasury: Provided, always,* that the whole amount which any register of the land offices shall *receive under the provisions of this act* shall not exceed, for any one year, the sum of three thousand dollars."

It will be observed, that the provision above quoted relates exclusively to the *commissions* on moneys, expressed in "receipts filed and entered;" an account of which should be transmitted to the Secretary of the Treasury. These commissions were to be paid from the treasury.

It does not prescribe any limit to the amount of fees which might be demanded under the act of 1800; but only repealed those payable "for the entry of lands, and for certificates of money paid;"

but it does not repeal or prohibit those provided for copies of applications, plats, entries in books, or for inspections of books of surveys and plates made in their presence.

This act of 1818 provides for paying the registers from the treasury, where the records show how much they receive. It makes no provision for keeping and rendering an account of the fees which they may be entitled to and received from persons transacting business at their offices, such as are provided in relation to custom-house officers, clerks, district attorneys and marshals, by the act of 26th February, 1853, (10 U. S. L., 165,) and consuls, &c., by the act of 1856, (11 U. S. L., 55.) The compensation is arrived at by computing the receipts filed, and allowing one per cent. up to $2,500.

The act of the 20th of April, 1820, (3 U. S. L., 567, § 5,) provides for the registers a fee of $5 per day for their attendance at public land sales, which is clearly an addition to the three thousand dollars, the former limitation.

Under the 8th section of the act of the 2d of March, 1821, (3 U. S. L., 612,) for the relief of the purchasers of public lands, certain duties were imposed upon the registers, and a fee of fifty cents was provided for its performance, to be paid by the party relinquishing lands, which they declined to pay for under former contracts of purchase.

The act of the 24th of May, 1824, (4 U. S. L., 31, § 3,) providing for the correction of errors in making entries, authorizes the register to receive twenty-five cents for each oath administered, and the same sum for every hundred words of the evidence received and transmitted to the General Land Office, to be paid by the party making the application to change the entry. This is also an addition to the previously limited amount.

The act of the 22d of May, 1826, (4 U. S. L., 193,) authorizes the Secretary of the Treasury, with the approbation of the President, to make to the registers such additional allowance for carrying into effect the act of 1826, as he deemed reasonable, not to exceed the expenditure for clerk hire, and one-half of one per cent. on the amount of payments relinquished under the act of the 2d of March, 1821, (3 U. S. L., 612)—

"*Provided*, That the allowance made on account of *per centage*, including their annual salary, and including their commission on the money actually paid, shall in no case exceed, to any one officer, for any one year, the sum of three thousand dollars."

Subsequently, and on the same day, an act was passed allowing receivers compensation for the expenses of depositing the moneys received by them, which was made to relate back and apply to all receivers subsequent to the act of 1818.

The act of June 12, 1840, (5 U. S. L., 384,) authorizing registers to administer oaths in relation to the entry or purchase of public land, making false swearing perjury, provides that no fees shall be charged for administering such oaths.

This act leaves that of 1824, in relation to other oaths, (4 U. S. L., 31, § 3,) in force, as it does not relate to the same subject-matter.

Thus the law stood when the first bounty act passed. The limitation was confined to the per centage beyond the salary, and Congress had made standing provision for fees, and authorized the register to demand, receive, and retain fees in special cases, without regard to the limitations contained in the act of 1818. The example had been set of making extra compensation for services which were beyond the ordinary course of business, and specific fees were lawfully received, regardless of that act.

The 9th section of the act of the 11th of February, 1847, (9 U. S. L., 125,) provides bounty lands for non-commissioned officers, musicians and privates, under certain circumstances, which were to be entered under land warrants to be issued by the Government.

This act naturally increased the business at the office of the registers, without providing the means of adequate compensation. It gave no per centage or fees. The register was sure of nothing but his salary, although land of the value of millions might be entered at his office. The history of the times, and the reports of the General Land Office, show that vast quantities of land were entered under land warrants, while the amount of cash sales, on which a per centage could be received, was greatly diminished.

This condition of things led to the passage of the act of the 17th of May, 1848, (9 U. S. L., 231,) which provides:

"That, for the services which may be rendered, after the passage of this act, by the registers and receivers of the several land offices of the United States, in carrying out the provisions of the 9th section of the act of the 11th of February, 1847, * * they shall each be entitled to require of the *holders* of warrants issued under that act, for one hundred and sixty acres, the sum of fifty cents each; and from the holders of warrants issued under the same law, for forty acres, the sum of twenty-five cents for each, as a full compensation for those services: *Provided*, That in all cases where the warrant is located by, and for the use of, the *volunteer and soldier* to whom such warrant may have issued, for services rendered under the act aforesaid, *no compensation shall be charged*, either by the register or receiver, for making such location."

Here is authority to receive additional fees for a portion of the labor occasioned by the bounty land act of 1847, and there is no limitation. Hence, the register is entitled to retain the fees so received for services under that act.

The act of the 28th of September, 1850, (9 U. S. L., 520,) made provision giving bounty lands to the commissioned officers serving in the Mexican war, and all officers, musicians, and privates who served or fought in the war of 1812. Nothing is said in that act concerning the fees of registers. The fourth section provides that the holder of a warrant may transmit it to the the General Land

Office, designating the State and land district in which he wishes his lands entered, and that the Commissioner shall "cause it to be located free of expense," upon good farming land, as far as it "can be ascertained from the maps, plats, and field notes of the surveyor, or from other information in possession of the local office." The object of this provision was to relieve the party from the necessity of attending to make an entry, or employing an agent to do so for him. But it greatly increased the duties of the local officers, as it required, in addition to the ordinary labor of making an entry, that they should search the maps, plats, and field notes to find good farming lands to be entered.

The act of the 22d of March, 1852, (10 U. S. L., 4,) makes land warrants assignable, and authorized their being used in the payment for lands, which were not subject to entry at private sale, at a dollar and a quarter per acre, by making up the balance in cash. It then makes provision for registers' fees:

"§ 2. That the registers and receivers of the land offices shall hereafter be severally authorized to *charge and receive*, for their services in locating *all military* bounty land warrants issued since the 11th of February, 1847, the same compensation, or per centage, to which they are entitled by law for sales of the public lands for cash, at the rate of one dollar and twenty-five cents per acre, the said compensation to be hereafter *paid by the assignees or holders of such warrants.*"

This provision, applied to future services, was without any limitation whatever, and was payable by those making locations, and cost the Government nothing. It was intended to compensate the registers for the immense accession of business at their offices, for some of which no compensation had been provided. It would give them two dollars for each entry of one hundred and sixty acres, being much less than was allowed half a century before under an early act of Congress.

As these officers had rendered a vast amount of gratuitous services under the act of 1850, Congress thought it right to make them some compensation therefor, and therefore made, by the 3d section, the following provision:

"§ 3. That the registers and receivers, whether in or out of office at the passage of this act, or their legal representatives, in case of death, shall be entitled to receive from the *Treasury* of the United States, for services *heretofore* performed in locating military bounty land warrants, the same rate of compensation provided in the preceding section for services hereafter to be performed, after deducting the amount already received by such officers, under the act entitled 'An act to require the holders of military land warrants to compensate the land officers of the United States for services in relation to the location of those warrants,' approved May 17th, 1848: *Provided*, That no register or receiver shall receive any compen-

tion out of the Treasury for *past* services who has charged and received illegal fees for the location of such warrants: *And provided further*, That no register or receiver shall receive for his services, during any year, a greater compensation than the maximum allowed by law."

Under this provision the registers could be compensated out of the *Treasury* to an amount which, when added to the per centage on cash sales, and to their salary, would make up the sum of $3,000. This limitation relates exclusively to the salary and per centage provided in this section and former laws, and does not apply to the fees and compensation which might be demanded from persons making entry under land warrants. The Government demanded that certain duties should be performed for $3,000, and left the officer to be paid by others for the increased labor thrown upon him for their benefit.

If Congress had intended to claim of the registers what they might lawfully demand of and receive from private persons, some provision would have been made for keeping and rendering an account of such receipts. But that body was looking to the protection of the Treasury, and only made provision against its being overcharged.

If it had been the intention of Congress to limit the registers to $3,000 for salary, fees, and all kinds of services, it would have been so provided in the act itself. There is no trace in the statutes, of an intention on the part of the legislature, to make land office fees a source of national revenue.

From the commencement of our land system, it has been deemed the best policy to open the public lands to the settler upon terms most beneficial to him. Except fees for what the party might want for his own special purposes, as copies of papers, &c., and making entries for those who purchased land warrants, the Government has, since the origin of the cash system, paid all the expenses of their land sales. There is no ground for now saying, that in relation to the purchasers of land warrants, that, in the very act authorizing their assignment, the Government meant to make them contribute to the Treasury, and, at the same time, make the land officers labor for nothing, under a statute that fixes the price of that labor.

The act of the 3d of March, 1855, (10 U. S. L., 635,) to increase the compensation for registers and receivers of land offices, proceeds upon this distinction. It consists of one section only, and provides:

"That each register of a land office and receiver of public moneys shall receive the same amount of pay for each and every entry of land made under the graduation act of 1854, as such officer is by law entitled to receive for similar entries of land at the minimum price of one dollar and twenty-five cents per acre: *Provided*, That the whole amount received per year shall, in no case, exceed the limitation fixed by existing laws."

Here, Congress authorizes the registers to receive compensation for the entry of the cheap, refuse lands, equal to what they would receive if the lands had been worth $1 25 per acre, and, for the reason, that the labor is the same. They were careful to guard the Treasury against a claim of over $3,000, by any one of its officers. But no allusion is made to what others may pay for services rendered for them.

Subsequently, but on the same day, Congress passed an act (10 U. S. L., 701) extending the bounty land system to all who had, after 1790, been engaged in the military service for fourteen days, or been in battle, in any of our wars. This act was calculated greatly to increase the number of land warrants to be issued and located. The registers and receivers were fairly entitled to compensation for this increase of official duties performed exclusively for the benefit of those holding warrants, and not for the Government, which derived no profit from it. Hence, Congress provided, by the sixth section:

"That the registers and receivers of the several land offices shall be severally authorized to *charge and receive for their services*, in locating all warrants under the provisions of this act, the same compensation or per centage to which they are entitled by law for the sales of public lands, for cash, at the rate of one dollar and twenty-five cents per acre, the said compensation to be *paid by the assignees or holders of such warrants.*"

This provision is clear and explicit. The registers are authorized to charge and receive for their services the compensation provided by it, to be paid by the holder of the warrant. No limitation is provided upon the amount they might receive and retain. The money is to come from those for whom the registers render services. There is nothing in the act indicating an intention, on the part of Congress, to make such holders tributary to the treasury, or that it was designed to make these officers perform quadrupled labors for nothing. It was clearly the design of that body to compensate those officers for their increased labors, and, so far as it should be performed for the holders of warrants, it should be paid by them.

This preserves the consistency of congressional legislation, which limits the compensation to be paid to the Registers by the Government to $3,000, but conferring upon them the legal right to demand and receive from others pay for the services which such officers might render them.

There are no acts in conflict with this view.

If the acts of 1818, 1848, 1852, and 1855 limited the compensation from *all* sources to $3,000, then the following provisions were unnecessary, and would not have been enacted.

The act of March 3, 1853, (10 U. S. L., 204,) appropriates $141,700 for salaries and commissions of registers and receivers; and then provides: "That whenever the amount received at any

United States land office, under the *third* section of an act entitled 'An act to make land warrants assignable, and for other purposes,' approved March 22, 1852, has exceeded or shall exceed the amount which the registers and receivers at any such office are entitled to receive under said *third* section, the surplus which shall remain, after paying the amount due as aforesaid to the said registers and receivers, shall be paid into the treasury of the United States."

This provision shows that Congress well understood that the limitation applied to the *third* section alone, and not to the second, and that it related to per centage, and not to fees; and when the maximum of compensation had been reached, by computing the per centage under it, the remainder should be restored to the treasury.

Another act of March 3, 1853, (10 U. S. L., 245, § 5,) provides for the appointment of registers and receivers in California, and fixes their salary at $3,000. The 6th section provides, that "the register and receiver shall not be entitled to any per centage or fees, except for deciding pre-emption cases, when each of them shall be entitled to the same fees as are paid to other like officers."

This provision concedes, that the register would be entitled to a per centage and fees, but for this prohibition; and those authorized to be taken may be retained, which could not be, if the act of 1818 and the other acts referred to mean what it is claimed by the Government they mean. Under the theory of the plaintiffs these fees must be paid into the treasury. This provision is wholly inconsistent with that theory.

The act to amend an act concerning the public lands in Oregon, passed July 17, 1854, (10 U. S. L., 306, § 6,) provides for the appointment of registers and receivers, and "that their compensation shall be twenty-five hundred dollars each, and office rent; but they shall be entitled to no fees, or other emoluments of any kind whatsoever, except the receiver's actual and necessary expenses in depositing; and on satisfactory proof that either of said officers, or any other officer, has charged or received fees or other reward not authorized by law, he shall be forthwith removed from office."

If the registers were not at that time authorized to receive fees, this enactment, declaring that they should not be entitled to them, would have been unnecessary, and would not have been made.

The 7th section of the civil appropriation bill, of the 18th of August, 1856, referred to on the other side, (11 U. S. L., 91,) has no bearing upon the question. It authorized the Secretary of the Interior, in settling register's accounts, "to allow, subject to the approval of Congress, such reasonable compensation for additional clerical services and extraordinary expenses incident to said offices, as he shall think just and proper, and report to Congress all such cases of allowance at each succeeding session, with estimates of the sum or sums required to pay the same."

It has been seen that the grantees of warrants, under nearly all the acts, were not chargeable with fees of ordinary entries, and that, under the act of 1850, (9 U. S. L., 520,) the land officers were required to locate for them and their heirs, "free of expense." These provisions required a large amount of labor, for which no compensation was provided; hence the propriety of a reasonable compensation, for the additional clerk hire and expenses, that these provisions occasioned. When this unpaid service substantially ended, Congress repealed the act, (12 U. S. L., 133.) It is not shown that the defendant received anything under this act of 1856, or what has been done under it.

The act of June 12th, 1858, (11 U. S. L., 325,) provides that "the register of the land office and receiver of public moneys, in the Territory of New Mexico, shall receive the same compensation now allowed by law to the same class of officers in Washington Territory: *Provided*, Their compensation, including fees, shall not exceed three thousand dollars each per annum."

This proviso was wholly unnecessary, if the theory of the plaintiffs is correct. Under their construction, Congress, in 1818, and three times since, had already enacted this provision. This provision concedes the existing right to receive fees, but includes them with the per centages and salary, limiting the whole to three thousand dollars.

Such provisions as these were not necessary, and clearly would not have been made if the act of 1818, and other acts, are entitled to be construed as contended for by the plaintiffs. Congress is presumed to know the existing law when it legislates, and, therefore, will not waste its time in re-enacting it, or making unnecessary provisions.

Conclusions drawn from the Statutes Cited.

1. That where the Government is benefitted by the services of the register, it compensates him directly from the Treasury.

An exception occurs under the 3d section of the act of 1852, where certain past gratuitous services were thus paid.

2. Where the services are for the benefit of the parties who require them fees are demandable, sometimes in specific amounts, and, at others, computable from a scale established by Congress.

3. That where the services are for the Government, the compensation is limited, including the salary of five hundred dollars to three thousand dollars per annum, except in Oregon, Washington, and where it is $2,500 only.

The payments for former uncompensated services under the 3d section of the act of 1852, though paid from the Treasury, were thus limited.

4. That all fees or compensation paid by individuals to the registers belong exclusively to them, there being no limitation in any

act relating to them, and no law requiring them to keep an account of them, or to pay over to the Government any portion thereof.

If these views are correct, the demurrer was properly decided in the court below, and the judgment must be affirmed. All the fees in controversy were lawfully received and retained for the sole use of the register, the Government never having declared its purpose of claiming them, or provided the means of ascertaining their amount, nor required them, under any law, to be paid into the Treasury. Congress has protected the Treasury against demands, by registers, for amounts exceeding three thousand dollars, for services rendered for the Government, and left them to receive and enjoy such compensation for services performed for others, as the law authorizes them to demand and receive.

All these views apply to Cole's case.

Dated 9th December, 1861.

REVERDY JOHNSON,
R. H. GILLET,
Of Counsel for Defendants.

Supreme Court of the United States.

L. W. BABBITT, AND OTHERS, *ads.* THE UNITED STATES. } December Term, 1861.

ERROR, TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IOWA.

ARGUMENT OF LE GRAND BYINGTON.

THE CASE.

This suit was brought by the United States upon the official bond of the defendant, Babbitt, as Register of the land office at Kanesville, Iowa, which was executed on the 9th of May, 1853. The bond is set out as part of the petition, and shows its only condition to have been the general one, that Babbitt should "truly and faithfully execute all the duties of the said office *according to law*;" and then assigns, as a breach of this condition, (after stating certain matters as conclusions of law,) "That the said Lysander W. Babbitt, as such Register aforesaid, and by virtue of his said office, did, during the time in which he held and possessed said office, to wit, during his first, second, third, and fourth official years, to wit, from the 6th day of April, 1853, to the 20th of October, 1856, receive, *as fees*, for the location of military bounty land warrants, under the provisions of the acts of Congress, approved 11th of February, 1847; 25th of September, 1850; 22d of March, 1852, and 3d of March, 1855, the sum of $13,879 08, and of that sum the said Babbitt still holds and refuses to pay to the plaintiff, though often requested and directed by the proper authorities so to do. *the sum of nine thousand, eight hundred and sixteen dollars and twenty-four cents.*"

To this petition is attached a statement of an account by

the Commissioner of the Land Office, certified, and alledged to have been made in pursuance of the provisions of the act of March 3, 1797, (1 Statutes, 512,) tending to show the last named sum as a balance against the defendant, *for location fees,* ascertained before the commencement of this suit.

The defendants interpose a demurrer to this petition, and assign, specially, for causes—

1st. That the pleading (petition) does not designate a cause of action, in form; and

2d. That the said Babbitt was entitled to the said sums received by him, as his fees of office, and was not bound to account to the plaintiff for the same.

The court below sustained this demurrer, and the plaintiff prosecutes this writ of error.

THE ARGUMENT.

Upon this state of the record, I propose to submit to the Court a few observations, in addition to those which have been presented by the other counsel for the defendants.

I.

It is observable that the sole question here presented for decision is this: Was the failure to pay these warrant location fees into the Treasury, as charged, a violation of any official *duty* imposed upon the Register, Babbitt, *by law?* I do not understand the plaintiff to claim that there is any *express* provision of law requiring a register to keep and pay over these fees, as public money, but that such *duty* is to be *inferred* from the negative provisions of the act of 1818, passed many years before any of these fees were in any manner created. I insist, then, at the outset, that whatever question might possibly arise between the plaintiff and Mr. Babbitt, in an action for money had and received, it is perfectly clear that, as between the plaintiff and the obligors of this penal bond, the alledged official duty must rest upon the *positive* injunctions of the law. We shall presently see, that in all the acts of Congress by which the collection of these fees is permitted—only permitted—there is not a single provision that in any manner *declares* that they shall be kept as public money, or paid into the public Treasury. It cannot,

therefore, be said, as against these defendants, that a failure to so keep, and so pay them over, is a violation of any "*duty*" imposed upon the Register "*by law.*"

II.

But the plaintiff—assuming this *duty* to have existed, although unable to show any express provision imposing it—claims, that the failure to pay over $9,816 of these fees, *as alledged,* was such a violation of official *duty* as involved a breach of the condition of this bond. Let us see, then, *what is alledged.* The averment is, that the defendant, Babbitt, received as Register, during the first, second, third, and fourth years of his term, the sum of thirteen thousand dollars in land warrant location fees, and refused to pay into the treasury $9,816 thereof. By the very interpretation which the plaintiff himself puts upon all the laws fixing the Register's compensation, he admits that the Register is fully entitled to fees and commissions to the amount of $2,500 per annum, which, for the four years specified, would aggregate the sum of ten thousand dollars; or $184 *more* than the sum, the non-payment of which is claimed to be the breach of the conditions of this bond complained of. It is not alledged in this petition that this sum of $9,816 was an *excess, or surplus* above the annual salary of the defendant, Babbitt, for the four years named; but that, of the larger sum, (13,879,) which the said Babbitt received, he "still holds and refuses to pay over the sum of $9,816 24." The necessary inference is, that the difference between the two named sums is not in controversy; and that, as to the smaller sum, it was well retained in satisfaction of the four years' allowance, which the plaintiff's own construction gives to the Register. True, there is a pretended statement of an account, attached to the petition, upon which a corresponding balance appears, and which the plaintiff says he will offer in evidence; but it is submitted that this account is not within the act of March 3, 1797, (1 Laws, 512,) and therefore is not well pleaded. This last named statute applies only to "*revenue officers,* and and persons accountable *for public money,*" and no act of Congress ever placed a Register of a land office within that category. Besides, if it was well pleaded, it would be inadmissible under the authority of the case of U. S. vs. Patterson, Gilpin, 47, which decides that, "The Auditor's *report* of a balance due from a person *accountable for public money,* is

a guide to the Comptroller in bringing suit, but not *evidence to the court* of the debt;" and further, that such "a certified statement of a *balance due* is not such a transcript as may be *given in evidence*, under the second section of the act of March 3, 1797."

Manifestly, then, there is nothing upon the face of this petition to show, that the defendant Babbitt had been otherwise paid the undisputed amount of his compensation for the four years therein named, or that this sum of $9,816 was an *excess* or *surplus;* consequently, his refusal to pay over said sum, is not *shown* to have been a violation of an official *duty*, and there is no breach of the condition of his bond. In other words, it is not really alledged in the case, that the sum in controversy was a *balance* or *excess*, and as *such* only could the plaintiff, *in any event*, be entitled to recover it.

III.

But I do not choose to rest the case of the defendants here. I deny that there was upon the Register any obligation whatever, under any circumstances, to pay over to the Treasury any part of these land warrant location fees.

For more than sixty years, under the legislation of Congress, the compensation of Registers of the land offices has been compounded of—

1st. Stated salary;

2d. Commissions upon cash sales, &c.;

3d. Fees;

and during all this time, each one of these elements has, in greater or less proportion, and under different modifications, entered into the sums which the Registers have received for their services.

For twenty years before, and during forty years after, the passage of the act of 1818, which is the sole reliance of the plaintiff, the course of congressional legislation has exhibited an uniform, continuous, and consistent policy upon this subject matter. An examination and comparison of the numerous statutes which have been collated by my associate counsel for the defendants, will demonstrate that uniformly, the portions of compensation which consist of *salary* and commissions, on *money received*, payable from the Treasury, have been limited to *specific sums;* while that portion consisting of *fees*, payable by individuals, has been universally

left to the contingencies of the entire amount of business transacted.

The error of the Government in this case, consists in its persevering attempt to confound and mingle these several *items* of compensation, and to bring them indiscriminately within the proviso of the act of 1818, which was a limitation upon *salary* and *commissions upon money* only; and the most absurd theories have been propagated by the plaintiff to give, *by construction*, a direction to land warrant fees which, had such been the intention of Congress, a few apt words would easily have accomplished.

Thus it has been claimed, that the limitation of *commissions* chargeable upon the Treasury, by the act of 1818, to the yearly sum of $2,500, excluded the allowance of any greater sum to the Register from any and all sources whatever; although it is notorious that under a multitude of laws, enacted prior and subsequent to this controversy about land warrant fees, the Registers have *always* received from individuals *fees* for various services incident to their offices, of which no account has ever been taken, and for which no demand by Government has ever been interposed. (See act of May 10, 1800, 2 U. S. L., 77; act of April 20, 1820, 3 U. S. L., 567; act of March 2, 1821, 3 U. S. L., 612; act of May 24, 1824, 4 U. S. L., 31; act of May 22, 1826, 4 U. S. L., 193.)

Under these, and various other special acts, the Registers have been, and still are, accustomed to receive individual *fees* for pre-emptions, for plats, for transcripts, for affidavits, for crying public sales, for correcting errors, for mileage, for taking testimony, &c., &c., to an unlimited aggregate amount, and no one has ever yet intimated that these moneys belonged to the public, or that any Register, either with or without bonds, could be required to account for or pay them into the Treasury, let the other items of his compensation amount to what they might.

Thus stood the law, and the practice under it, when these land warrant fees were legislated into existence. There will be found three acts, substantially alike, providing for the payment, by individuals, of these location fees to the Registers. They are the act of May 17, 1848, 9 U. S. L., 231; the act of March 22, 1852, 10 U. S. L., 4; and the act of March 3, 1855, 10 U. S. L., 635; every one of which granted these fees, when charged, unconditionally *to the register, as compensation for his services*, without a syllable which directed

him to account for them, or a bond to enforce their payment.

As services of this description had been already rendered, to a burthensome extent, by the Registers, without any provision for payment, and the individuals for whom they had been rendered were inaccessible, Congress made an exceptional case in their favor in the retroactive, third section of the act of 1852, by *charging upon the Treasury such an amount only* as would bring each Register's salary and *commissions* to the maximum authorized by law, leaving the provision, in the *second section*, for *future* additional compensation for those services *unlimited*, and in perfect harmony with all the rest of their legislation upon the subject; that is to say, if any Register had located these warrants *previous* to the allowance of fees therefor, and had not received, in *salary* and *commissions* on cash sales, the maximum of *those items* of compensation, ($3,000,) the Government would assume the payment of so much of these fees only as would make up deficiency. At the same time, by section two, making for *future services* an express and unlimited grant of all fees payable by individuals.

It is thus seen, that by all this legislation, these location fees were created as and for *additional "compensation."*

That they are granted wholly, absolutely, unlimitedly, to *these land officers."*

That they are not, anywhere or in any manner, treated as *public money.*

That their collection is not enjoined as a *duty*, but "permitted" as an *individual right.*

That no *account* is to kept, or *returns* made, of them.

That no *bond* secures them, nor any *registry* identifies them.

That they are not earned under the act of 1818, and cannot be forced by construction within the proviso of that act, which only declares, when treating of *salary* and commissions *on money*, "that the whole amount which any Register shall receive, *under the provisions of this act*, shall not exceed, for any one year, the sum of three thousand dollars.

And that they form no part of the commissions upon "money received" for land *sold*, within the meaning of any act which has ever been placed upon the statute-book.

How, then, does the Government show itself entitled to any portion of those fees? Not by the *letter* of the law, for the distinguished Attorney General has been unable to point out any clause, in all the multifarious legislation upon the

subject, which *expressly* directs the payment of any portion of them into the Treasury. On the contrary, the brief of my associates has most conclusively shown, that whenever and wherever they have been authorized, they were to be *charged by*, and received as *compensation to* the Register for extraordinary services, unknown to the legislation of 1818. The plaintiff, feeling the force of this position, invents a convenient, if not ingenious theory, by classing these *fees* as "per centage," and proceeds to announce thereupon "that this *excess* of *per centage* received by the defendant, must be accounted for to the plaintiff *unless some provision can be found to authorize its retention.*"

To this I have two answers: first, that such excess of "per centage" is imaginary, and its supposition assumes the whole ground of controversy; and second, that when these *fees* are meant by the term "per centage," in this connection, the *onus* is clearly upon the plaintiff, and as these *fees* were all of them given to the defendant *by express words*, they are *not* "to be accounted for to the plaintiff unless some provision can be found" to *require this surrender*. The only attempt which I have seen to show such requisition is an inferential assumption, that because the act of 1818 limits a Register's charges *upon the Treasury* for land *sales* to a specific sum, therefore, fees paid by individuals for *other services*, under a different law, must necessarily inure *to* the Treasury. In other words, that these fees all mean "per centage," and per centage was limited by the act of 1818, for all time and all services.

Under this vaunted legislation of 1818, the Register's compensation was a charge upon the *public fund*, and its limitation was proper in reference to the public interest; whereas, these *fees* are allowable for peculiar and vastly augmented labors, are chargeable to *individuals* who are receiving a benefit, and are uniformly *declared to be* recoverable as, and for a "compensation," for these specified and super-added "services," and besides, have not, in any single instance, been subjected by the laws awarding them, to the limitation of the act of 1818, or any limitation whatever.

Much less is the Government entitled to these fees by the *spirit* of the law, for wherever they have been given they are authorized as a personal privilege, in deference to new exigencies and vastly multiplied labors, expenses, and responsibilities. To one unfamiliar with the degree to which this land warrant legislation stimulated the entry of western lands, a truthful relation of the extent and complexity of

the transactions of these offices, during the period of Mr. Babbitt's incumbency, would appear wholly incredible. Under the cash system of 1818, the process of land entries was simple, and the quantities comparatively small. Under the warrant locations the process was complex, and the quantities amazing. As the system developed itself therefore, we find, upon examining the various acts which were successively called into existence, that while the compensation (per centage and salary) on money entries remained undisturbed, this vast accumulation of labor and responsibility upon the Register, has elicited corresponding provisions for *additional compensation*, to be paid by *individuals* for whom the labor was performed. While Congress was thus granting its domain in liberal bounties, can it be conceived that it had a purpose of deriving *revenue* from the unrequited labors of its overburthened Registers? And if such purpose can be imagined, in the absence of any appropriate declaration, is it possible that it would have left, as it did leave, the collection of these fees in the *discretion* of the Register, and utterly failed to prescribe any process of adjustment or bond to secure it? Beyond all question, had this Register neglected to "demand" or "receive" any fees whatever for locating these warrants, he would not, thereby, have failed in any *duty enjoined on him by law.* In no instance is the collection of these fees mandatory. No statement of them is required to be kept; no form was ever prescribed, or any *return* of them required to be made, and I undertake to say that outside of the mere assertions of this *ex-parte* account, made by the land office commissioner, there is not in existence *any documentary evidence whatever* of the payment of one dollar of them to the Register.

Nor can the Government invoke the *object* and *purpose* of these laws in support of its claims to these fees; for we do historically know, that they were enacted upon the clamorous demands of the land officers for an *additional* compensation, commensurate with the *new duties* which had been cast upon them. To provide this additional and appropriate compensation was the sole *purpose*, as it was the only pretext, of the creation of these fees. No one ever advocated either of them as a possible measure of revenue, and no better illustration of the utter absurdity of such an assumption can possibly be given, than a reference to the third year of Mr. Babbitt's incumbency.

Upon the 22nd page of the printed record, the Government shows that, for that year, Mr. Babbitt granted certificates for *cash entries* to the amount of $441,321—nearly *double* the labor necessary to earn his maximum commissions within the act of 1818—and, in *addition*, located the eonrmous number of 5,220 warrants, covering lands of the prescribed value of $745,779; and, for this last labor, if the plaintiff's construction is to prevail, *he is not allowed a single farthing, though it is well known, that it was five-fold greater than would have been required by the cash entry of these same lands!* and that these fees, which the plaintiff seeks to "confiscate," were expressly provided to "compensate" the Register for this very labor! What sort of "compensation" is this?

The defendant, Babbitt, is charged with a violation of public *duty*—with a breach of his bond—in not paying to the plaintiff these fees; whilst we have thus seen, that neither by the *letter* of the law, or by the *spirit* of the law, or by the *purpose* of the law, was the plaintiff entitled to any part of them.

How, then, is this claim sought to be supported? By construction—solely by construction. By suggesting difficulties where they do not exist; by assuming obscurities where everything is plainly expressed; by confounding fees of location, chargeable to individuals, with commissions on money allowed by Government; by making a proviso of one law control the enactments of another; and by applying legislative expressions to matters to which they do not pertain. Let me illustrate.

The proviso in the second section of the act of 1818 (3 St., 466) is made the foundation of this claim. It provided "that the whole *amount* which any Register of the land office shall receive *under the provisions of this act*, shall not exceed, for any one year, the sum of three thousand dollars." This "amount," "under the provisions of *this* act," consisted of $500 as fixed salary, and $2,500 "commissions on *moneys* expressed in the receipts by them filed," payable from the public treasury. These were the items, and this the mode of payment of this maximum "amount" receivable "*under this act.*" The restriction is to a maximum amount *of these items* for a particular service. No more, no less. Subsequently, laws are enacted, giving to Registers, without qualification, *fees* for *other* services, payable by individuals; whereupon the Government denominates them "commis-

sions," and calls upon the beneficiaries to show some authority for their retention, against the limitation of a former law, upon another subject matter! This double error consists in assuming, that the restriction is "upon the whole compensation of the Register," instead of the items specified in the act of 1818, and that it is for all time and all circumstances, instead of the particular time and circumstances which existed "*under the provisions of this act.*"

This original delusion, in regard to the force of the act of 1818, seems to color all the efforts of the Government to construe the various acts brought under review in this case. Thus a proviso, attached to the third section of the act of March 22, 1852, which merely restricted a *treasury payment* for past services, so as to give the Registers "the maximum compensation *now* allowed by law," is persistently claimed as extending the *specific* maximum of 1818, on sales and commissions, to all individual fees; and it is furthermore insisted on as controlling another section of the same act, of which it does not form a part!

And again it is insisted, in reference to the proviso in the appropriation act of 1853 (10 St., 204,) that, to establish this favorite theory of the plaintiff, we must believe that Congress meant to apply said proviso to the *second* section of the act of March 22, 1852, when they *declare* that it applies to the *third!*—that its "literal reading" did not mean either! but particularly referred to both! and its "precise" meaning could only be "extracted" by applying it to the act of 1818! and be demonstrated by the dicta of Mr. Justice Washington, in 2nd Cranch, 399, concerning "absurd consequences"!

"Thus explained," says the learned Attorney-General, *thus explained*, all these sections granting additional compensation by *fees*, which are themselves explicit and unconditional, mean that Registers shall do from five to fifteen times the labor which was required of them under the act of 1818, for the same "amount" of pay, and enjoy the privilege of paying into the Treasury the fees which are *expressly* given to *them* by terms too plain to admit of mystification.

It is said that it would be "absurd" to confine this proviso to the section which is *named* in the body of it! This pretense was so conclusively exploded by the opinion of the District Judge, as to justify a quotation. He says:—

"The argument of counsel assumes that it was not possible for the land officers to receive from the Treasury, under the

third section, a greater amount than they were entitled to receive. If it was possible for these officers to receive more money under that section than they were entitled to, then there is no absurdity in the provision that they should pay the 'surplus' received by them, under the 'third section,' into the Treasury, and there is no necessity for resorting to the extraordinary course of striking out the word 'third' and substituting the word 'second.' On the contrary, if such a possibility existed, it was highly proper to pass the provision in question, as a means of guarding the public Treasury from imposition.

"It seems to be assumed that it was impossible for these land officers to receive, under the third section of the act of 1852, a greater amount than they were entitled to, because the proviso to that section limited the amount to which they were entitled, to the sum of three thousand dollars per annum; and because the officers of the Treasury would never, in any case, have paid them out of the Treasury a greater amount than the maximum prescribed by the proviso. Hence, it is argued, it would have been absurd for Congress to provide that the officers should pay over to the Treasury any 'surplus' which should remain after paying the amount due to themselves. This argument proceeds upon a mistaken hypothesis. It assumes that under the third section of the act of 1852, the whole amount of the compensation up to the maximum of three thousand dollars, was to be paid out of the Treasury. But the truth is, that a part of this compensation had been received from the holders of warrants, under the act of March 17th, 1848. By the terms of the third section of the act of 1852, the officers were to receive from the Treasury a certain amount to make up former deficiencies, 'after deducting the amount already received under the act of 1848,' the whole not to exceed three thousand dollars per annum.

"The amount, therefore, to be paid from the Treasury was uncertain and contingent. It was dependent upon the amount which had been received under the act of 1848. The land officers were bound to account for the amount of fees which they had received under the act of 1848, and the Treasury became liable, under the provisions of the third section of the act of 1852, for the balance that might be due them. Suppose, then, any Register or Receiver in any settlement with the Government, prior to the act of March 5,

1853, had failed to account truly, or at all, for the fees he had received from the holders of warrants under the act of 1848; and suppose, in consequence, the Treasury had paid over to him a greater amount than he was entitled to, by the terms of the third section, was it not proper for Congress to provide that he should pay the 'surplus' into the Treasury? And the mere possibility that such a thing might occur in settlements made with the land officers after the passage of the act of March 3, 1853, was a sufficient reason for the provision contained in that act that the Register and Receiver should pay into the Treasury any 'surplus' they might receive under the 'third section,' over and above what they were entitled to receive. In this way, it was clearly possible for the land officers to receive, under the third section of the act of 1852, a greater amount of money from the Treasury than they were entitled to by the provisions of that section. Thus, by way of illustration, if the Register had received, under the act of 1848, fees to the amount of two thousand dollars per annum, and accounted in any settlement for only fifteen hundred dollars per annum, and if he had, in consequence, received from the Treasury fifteen hundred dollars per annum, he would have been required, by the act of 1853, to pay into the Treasury five hundred dollars per annum as the surplus received by him under the provisions of the 'third' section of the act of 1852.

"Again, the first proviso of the third section of the act of 1852, declares 'that no Register or Receiver shall receive any compensation from the Treasury, for past services, who has charged and received illegal fees for the location of land warrants, etc.' Now, certainly, it was not impossible that some Register or Receiver had charged illegal fees under the act of 1848, and that the Government, in ignorance of the fact, had, at the time of the passage in 1853, paid, or would thereafter pay, to the delinquent officer, the amount to which he would have been rightfully entitled, under the third section of the act of 1852, if he had charged and received no illegal fees.

"This was a contingency in which the said officers would have in their hands a greater amount of money than they were entitled to receive under the third section of the act of 1852, and there was nothing extraordinary in the fact of Congress making a provision by the law of 1852, that it should be paid into the Treasury. But for the sake of argu-

ment, let us accept the hypothesis of counsel—let us suppose that Congress intended to use the word 'second,' in the provision of the act of 1853. Does it follow, that because Congress provided in the act of 1853, that any excess of fees received under the act of 1852, should be paid into the Treasury, we must conclude that Congress intended that any excess of fees received under the act passed three years later, should, in the absence of any law whatever requiring it, be paid over to the public revenue?"

Equally unfortunate is the plaintiff's allusion to the act of March 3, 1855, (10th Stat., 635,) which refers *solely to lands entered with cash*, under the graduation act of 1854, and merely provides that the Register shall receive the same "amount of pay" on *every entry* (not location) of these graduated lands, as he would be entitled to if the land had been sold for $1 25 per acre. "*Provided*, that the whole amount received per year shall in no case exceed the limitation *fixed by existing laws*."

How "received?" Manifestly under the provisions of the particular act, that is, for commissions on *cash* entries. In other words, permitting lands which should be sold under the act for *less* than $1 25 per acre, to be computed at that valuation for the mere purpose of fixing the cash commissions allowed and limited by the law of 1818. Is there here any reference to land warrant fees, or any fees whatever?

The allusions which have, in the same vein, been made to the acts concerning salaries in California, Oregon, Washington, and New Mexico, need not be noticed, (because they are special, and refer to particular localities,) further than merely to remark that they all fortify the defense in this case by showing that whenever Congress *intended* to withhold these fees from the Registers, they have *expressed* the prohibition. Of course, then, where it is *not* so expressed in similar legislation, it cannot, with any propriety, be said to exist.

But why waste words in reference to the modes of construing these sections, providing fees to a Register for locating land warrants. Is it not sufficient to say, as judges have said in a thousand instances, that *where there is no ambiguity* no rules of construction are necessary or admissible? The legislature has *said* that these fees (all of them) are receivable by the Register as "*compensation for his services*," and it has *not* any where said that they are public money due to the Treasury. Does the understanding require any extrinsic aids to comprehend this legislation? or, that rules of

construction shall be marshaled to *explain* what cannot be misunderstood? or, that where there is no ambiguity there should be labored efforts to remove a doubt? In all these acts granting these fees, can the idea be anywhere gathered that any portion of them was public property?

But, suppose there *was a doubt?* In the case of the United States *vs.* Morse, (3 Story, 91,) Mr. Justice Story of this Court said:

"Where the words of a statute, giving compensation to a public officer, are loose or obscure, and admit of two interpretations, it seems to me that the construction ought to be favorable to the claims of the officer," and he decided the case accordingly.

My conclusions, then, are:

First. That in these acts, authorizing fees to Registers, there are explicit, unambiguous, unlimited *grants,* of all these fees, *in absolute property* to the officer, which no *construction* can defeat or abridge; and

Secondly. That if mistaken in this, that then a fair construction of these laws, in *pari materia,* will demonstrate that Congress, in every instance, when imposing new labors upon Registers have, at the time or soon after, given them *additional* pay; that they have never, in a single instance, limited *the compensation arising from these fees when paid by individuals*; that they have never required them to be kept by any receiver of public moneys, or secured by bond, or paid into the Treasury; and that in every single instance, in which a limitation has been imposed upon *any portion* of a Register's compensation, (except the *special* cases of California, &c.,) they have confined it to commissions or per centage upon *cash sales,* which were *a charge upon the Treasury.*

The plaintiff's theory of construction rests upon sundry *provisos.* In reference to these, this Court say, in 15 Peters, 166, "A proviso carves special exceptions *only,* out of an enacting clause, and those who set up any such exception, must establish it as being within the *words,* as well as within the reason thereof." Where are the words, or where the *reason* of any law, which required these individual fees to go into the Treasury as public property?

It seems to me that all the efforts of the plaintiff to *construe* these statutes by reference to provisos and former laws, is directed to a defeat of, instead of giving effect to, the reasons of the acts thus construed.

IV.

Thus much in reference to the *general* subject of these laws, and to the argument of the learned Attorney-General, upon those fees which accrued prior to the act of March 3, 1855 (10 St., 701.) As much the larger portion of the fees in controversy accrued under this last named act, a few additional words upon its provisions may be justified. The 6th section enacts—

"That Registers and Receivers of the several land offices, *severally* authorized to charge and receive for their services in locating all warrants under the provisions of this act, the same compensation or per centage to which they are entitled by law for *sales* of the public lands *for cash, at the rate of one dollar and twenty-five cents per acre*, the said *compensation* to be paid by the assignees or holders of such warrants."

That is to say, for such lands as are appropriated by *sale*, these officers may receive a compensation of one per cent. upon the "moneys expressed in the receipts by them filed," under the act of 1818, let the price *per acre* be what it may, limited to a maximum of $2,500 per year; and that for such as are appropriated by *locations of warrants*, they may receive from individuals a compensation of one per cent. upon a prefixed value of one dollar and a quarter per acre, without any limitation whatever as to the maximum. Thus, if a forty acre tract is sold at $5 per acre, cash, the purchase money "expressed in the receipt" is $200, and the compensation to the Register, therefor, is two dollars, and is a charge upon the fund; and if another forty acre tract is *located by warrant*, let its real price be what it may, it is estimated for computation at $50, and the compensation to the register therefor is fifty cents, chargeable to the holder; and when the compensation on the "moneys expressed in the cash receipts filed" has reached $2,500, it ceases on that item for the residue of the year, but the compensation for the warrant locations is receivable as long as the locations continue to be made.

It is argued by the plaintiff, that the prior "practice" of Congress was to limit *this last species* of compensation to a given maximum.

My answer is, that we dispute the fact assumed, and that no such practice can be shown from the legislation of Congress; but that further than this, if it were even so, the *positive* provisions of this law are utterly beyond the reach of

any such "previous practice." The act of March 3, 1849, (9 St., 398,) cited on the other side, is entirely inapplicable, because there is nothing here or anywhere else which makes a Register a "receiving officer," or gives to these fees the character of "public dues."

But the Government attorney attacks this impregnable section in rear as well as in front, and argues that *subsequent*, as well as previous legislation, so fritters away its provisions as to deprive Registers of the fees granted to them, and practically compels them to perform an immensity of labor without the "compensation" here granted to them therefor. The general appropriation act of August 18, 1856, sec. 7, (11 Stat. 91,) is referred to as authority for withholding these fees. It provides, incidentally, that the Secretary of the Interior may allow reasonable compensation to Registers and Receivers "for additional clerical services and extraordinary expenses incident to said offices.

How this discretionary provision, even if it could be supposed to refer to land warrant fees at all, is to control and nullify a positive grant of a general law, or how a possible remuneration for "extraordinary" services can wholly supersede, without naming it, a wholesome general provision for *ordinary* ones, passes my comprehension. It is quite unnecessary to speculate upon the matter. The question of the relevancy of this law is entirely disposed of by the suggestion of two well-known facts; first, that by locating large numbers of these warrants for the original soldiers, or warrantees, for which no fee was ever provided, and in many other ways, these "extraordinary" labors and expenses were incurred, outside the provisions of all these warrant acts combined; and *second*, that the *cash entries* (as in Mr. Babbitt's third year) had reached such a magnitude that the provision of 1818 was wholly inadequate to compensate *that portion* of the Register's duties; and that upon such matters as these the aforesaid clause expended its whole vitality, without having come within striking distance of the act of 1855, and was, within a year or two afterwards, repealed.

A single citation only, and perhaps the most unlucky of all to the plaintiff's theory of construction, remains. It is said that the limitation of 1818 has been extended, by express terms, to all these land warrant fees, by a declaratory act, February 2, 1859. (11 Stat., 378.)

Upon looking at the act, we find it declaring itself to be:

"An act to fix and regulate the compensation of Receiv-

ers and Registers of the land offices *under the provisions* of the act approved April 20, 1818," and providing—

"That said act shall be so construed, by the proper accounting officers of the Government, as to restrict the aggregate amount allowed as compensation for the Register's and Receiver's *commissions on moneys received*," in any one calendar year, to the sum of $2,500 each, and that the Register and Receiver shall not receive for any one *quarter* or fractional quarter, more than a *pro rata* allowance of said maximum."

Of course this act, being confined exclusively to the "commissions *on moneys received*," does not approach quite as near these land warrant fees as others which have failed to touch them; but it unquestionably accomplished its only object, by securing a proper *distribution* of the commissions under the act of 1818, to which it refers; and prevented parties from imposing upon the Treasury, by first securing (within a few weeks) the maximum, and then *transferring* to family connections, by resignation, the opportunity to repeat the operation several times within the "calendar year."

There remains, then, nothing further to be said upon this issue, and I close with my indorsement of the words uttered by the District Judge in pronouncing his decision of the case, wherein he says:

"It is my opinion, that if the sales of the public lands and the location of warrants had gone on in the ordinary and regular course, this controversy would never have arisen. In that case, the amount of *business*, which was in fact compressed within two or three years, would have been extended through a long series of years, and the amount of compensation from fees would not have appeared too large. But the vast and unparalleled accumulation of business, within a comparatively short space of time, led to a corresponding accumulation of land warrant fees, insomuch that the aggregate seemed to give the officers an exorbitant compensation for their services. This, however, can have no effect upon their legal rights, growing out of the construction of the law upon which their claims are founded."

LE GRAND BYINGTON,
For Defendants.

act Feb 12 1859 -
11 Stat 378 Superintendent
construction —
Lie act 1849 —
22 How 312
act 1849-9 Stat 378

SUPREME COURT OF THE UNITED STATES.

No. ~~172~~. 94.

THE COMMERCIAL TRANSPORTATION COMPANY, CLAIMANTS OF THE STEAMBOAT COMMERCE, APPELLANTS,

vs.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, AND JAMES PECK.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF NEW YORK.

G. S. GIDEON, Printer, 511 Ninth street, Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 172.

THE COMMERCIAL TRANSPORTATION COMPANY, CLAIMANTS OF THE STEAMBOAT COMMERCE, APPELLANTS,

vs.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, AND JAMES PECK.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF NEW YORK.

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UNITED STATES OF AMERICA,
Southern District of New York, ss.

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this
[L. S.] tenth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the said United States the eighty-fourth.

KENNETH G. WHITE, *Clerk.*

At a stated term of the district court of the United States of America for the southern district of New York, held at the City Hall, in the city of New York, on Saturday, the sixteenth day of December, in the year of our Lord one thousand eight
3 hundred and fifty-four.

Present, the Honorable Samuel R. Betts, district judge.

HENRY FITZHUGH, DEWITT C. LITTLEJOHN, and JAMES PECK,
vs.
The Steam Propeller COMMERCE, her tackle, &c.

1852, Aug. 27th. The libellants file their libel in the
4 words and figures following, to wit:

To the Honorable Samuel R. Betts, Judge of the District Court of the United States for the southern district of New York:

The libel of Henry Fitzhugh and Dewitt C. Littlejohn, of the city of Oswego, in the county of Oswego, in the State of
5 New York, and James Peck, of Chicago, in the State of Illinois, against the steam propeller Commerce, her engine, boilers, tackle, apparel and furniture, and also against all persons lawfully intervening for their interest in the same, in a cause of collision and damage, civil and maritime, alleges as follows:

First. That your libellants, before and at the time of the collision, hereinafter in the fifth and sixth articles mentioned, were the owners and proprietors of a certain vessel or boat com-
6 monly spoken of as a lake boat, and known and called the Isabella, of Norton's Landing, with her furniture and tackle

which said boat your libellants used and employed in the transportation of merchandise and freight, between the port of New York and the city of Oswego, by the way of the Hudson river and the canals of the State of New York, and between which
7 places she was regularly run for the purposes aforesaid in a line owned and conducted by the libellants.

Second. That before and at the time of the happening of the collision and damage hereinafter stated, the said boat called the Isabella was a tight, staunch, and strong boat, and at the time of the said collision was in every respect well manned, tackled, apparelled, appointed, and furnished, and in all respects
8 competent for the business in which she was then engaged, and having the usual and necessary complement of officers and men, and that the captain and men on board were on the look-out for the proper navigation and the protection and safety of the said boat.

Third. That on Thursday, the nineteenth day of August, in the year 1852, the said boat called the Isabella, being fully
9 freighted with merchandise, left the port and city of New York for the city and port of Albany, in a tow, towed by the steamboat called the Indiana, which said steamboat was and is usually engaged in the business of towing boats and other craft on the Hudson river, and which, at the time of the said collision, was in all respects well and sufficiently manned, tackled, apparelled and furnished, and in all respects competent for the business in which she was then engaged, and had on board a full crew of officers, pilots, engineers, and others to manage and
10 navigate the said steamboat, and that the boats and other craft in tow thereof had on board the proper complement of officers and men for the management and protection thereof.

Fourth. That the said boat Isabella was duly, properly, and safely attached and secured upon her starboard side to a barge called the , and that such barge and the said boat Isabella were towed astern of said steam tow-boat the Indiana, by a hawser put out for that purpose, and were at the usual and proper distance behind the Indiana for towing in that
11 manner; and that the Indiana had a barge on each side of her, and attached thereto, which barges she was towing in that manner before and at the time of the said collision.

Fifth. That about nine or ten o'clock in the evening of Friday, the twentieth day of August, A. D. 1852, the said boat Isabella, so being in the tow of the said steamboat Indiana, was ascending the Hudson river, and was between the village of New Baltimore and the village of Castleton and about ten or eleven miles
12 below the city of Albany, and was then and there met by the said steam propeller Commerce, which was descending the Hudson river bound on a voyage from the port of Albany to the port of Philadelphia.

That the said tow-boat Indiana and all the craft in tow of her were on the starboard or eastern side of the channel of the said river, and were in the proper place and portion of the said river and channel for boats and vessels so as aforesaid ascending such river to be, when the said boat Isabella, through the negligence and inattention of those on board of and having the charge of the said steam propeller the Commerce, and of their mere mis-
13 management and want of care, was run into and afoul of by the said steam propeller the Commerce, and was thereby so broken and injured that the said boat Isabella, with all her cargo, was then and there forthwith sunk in the channel of said river and in water about ten feet deep.

Sixth. That at the time of such collision the said steam-propeller Commerce had passed safely by the said steamboat Indiana and the barges attached, which were ahead of said canal-boat Isabella, and which were much broader on the water than the said Isabella and the barge to which she was so as aforesaid attached. That there were lights on board the said boat Indiana and the barges attached thereto, which were plainly visible to those
14 on board and having the charge of the said steam propeller the Commerce. That the night was not a dark one. That the master of the said boat Isabella was standing on the bow of his said boat, and that immediately before the collision he had a light in his hand, and that at the time of such collision the said light still remained on the forward part of the said Isabella, where it could be plainly seen. That, after passing the said steam tow-boat Indiana, and the said barges which were attached
15 abreast thereof, the said steam propeller the Commerce sheered suddenly to the larboard, so that she moved towards the eastern side of the said river, and so that she ran against the said boat Isabella, striking her on her larboard bow, broke all the lines by which she was attached to said barge, and left her floating at large on said , broke her larboard bow off from her stern, stove it in, and opened all her seams, so that she in a very few minutes sunk, with her whole cargo on board, in the channel
16 of said river.

Seventh. That such collision and damage happened solely through the mismanagement, carelessness, negligence and want of attention of those on board, and having the charge of the said steam propeller the Commerce, and could not have been prevented or avoided by those on board of either the said boat Isabella or the said steamboat the Indiana, all of whom did all that was in their power to avoid such collision, but without success; and that such collision and damage could not have happened had not the said steam propeller the Commerce altered the course she was on when she passed the said steam tow-boat Indiana, and sheered to
17 the larboard, as hereinbefore stated and set forth.

Eighth. That the said boat Isabella, before and at the time of the happening of the said collision, was a boat of the best class, and was fairly worth the sum of fifteen hundred dollars or thereabouts. That the libellants believe that, by reason of such collision and damage, and also of the fact that she sunk in the channel of said river, where steamboats and other vessels would be likely to strike upon her, and, as your libellants are informed and believe, have already run upon her, the libellants believe that the said boat Isabella is completely destroyed and will prove a total loss, besides the damage they will sustain from the loss of
18 the use of said boat in their aforesaid line.

Ninth. That, before and at the time of the happening of such collision, the said boat Isabella had on board a large and valuable cargo of freight, which she was then transporting, and which consisted in large part of teas, coffees, sugars, fish, dry goods and other kinds of merchandise, together with a steam-engine; and that the value of such cargo was about fifteen thousand dollars, as nearly as your libellants can now state the same; that, from the nature of such cargo, and of the injury to and the sinking of the said boat, your libellants believe that a very large portion of such goods and merchandise will prove to be a total loss, and that the remainder thereof will be very greatly damaged and injured
19 in value; and that your libellants will be subjected to great loss and expense for the expenses of the captain and crew of said boat, and for the hire of vessels and machinery and men, in raising and endeavoring to recover such boat and cargo, and that the loss and damage, by means of the sinking of said boat and the destruction and injury of said property on board thereof, and the expenses to which the libellants will be put, will amount to about seventeen thousand dollars; all which said damages were occasioned solely by the negligence, want of skill, improper conduct and unskilful management of the persons navigating the said propeller Commerce, and not by or through any fault, negligence or improper conduct on the part of the persons on board
20 either of said steamboat Indiana or said canal-boat Isabella.

Tenth. That the said steam propeller is now within or is expected very shortly to be within the port of New York, and within the jurisdiction of this court.

Eleventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray, that process in due form
21 of law, according to the course of courts of admiralty and of this honorable court, in cases of admiralty and maritime jurisdiction, may issue against the said steam propeller or vessel, the Commerce, her engine, boilers, tackle, apparel and furniture,

wherever the same may be found, and that all persons having any right, title or interest therein, may be cited to appear and answer all and singular the matters hereinbefore articulately alleged and propounded; and that this honorable court would be pleased to decree the payment of the damages aforesaid, and that the said vessel or propeller, the Commerce, her engine, boilers,
22 tackle, apparel and furniture, may be condemned and sold to pay the same, and that the said libellants may have such other and further relief as in law and justice they may be entitled to receive.

HENRY FITZHUGH,
DE WITT C. LITTLEJOHN,
JAMES PECK,
By F. W. DEMING, *Agent.*

LUCIEN BIRDSEYE,
Proctor for Libellants.
CHARLES P. KIRKLAND,
Advocate for Libellants.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss.

Frederick W. Deming, of said city, being duly sworn, says, that Henry Fitzhugh, De Witt C. Littlejohn and James Peck,
23 the libellants named in the foregoing libel, are respectively non-residents of the southern district of New York, and are now absent from said district; that this deponent is the clerk and agent in fact of the said libellants, and is in their employment in managing and conducting their business in the said city of New York, and that as such, he has signed the same as agent for said libellants; that he has heard the foregoing libel read, and knows the contents thereof, and that the said libel is true, according
24 to the best of deponent's knowledge and belief; that the said libellants were not present at, and can have no personal knowledge of the facts of such collision, and deponent believes he is better able to verify such libel than they are, this deponent having in the business of his said agency been obliged to investigate the facts of such collision.

F. W. DEMING.

Sworn to this 27th day of August, 1852, before me.
JOSEPH BRIDGHAM,
U. S. Com'r.

Endorsed: 10. 221. U. S. district court. Henry Fitzhugh
25 and others vs. The Steam Propeller Commerce, her engine, tackle, &c. Libel.

LUCIEN BIRDSEYE, *Proctor.*

Filed August 27, 1852.

District Court of the United States, for the southern district of New York.

Filed the 27 day of August, 1852.

Stipulation for Libellants' Costs entered into pursuant to the rules and practice of this Court.

Whereas a libel was filed in this court, on the twenty-seventh day of August, in the year of our Lord one thousand eight hundred and fifty-two, by Henry Fitzhugh and De Witt C.
26 Littlejohn, of Oswego, N. York, and James Peck, of Chicago, Illinois, against the steam propeller Commerce, her engine, boilers, tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said steam propeller, her tackle, &c., may be condemned and sold to pay the demands of the libellants; and the said libellants, and Robert F. Sage, and Frederick F. Lockwood, sureties, parties hereto, hereby consenting and agreeing, that in case of default or contumacy on the part of the libellants or their sureties, execution may issue against their goods, chattels, and lands, for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or in case of appeal, by the appellate court.

F. W. DEMING,
Agent for Libellants.

ROB'T F. SAGE,
FREDERICK F. LOCKWOOD.

Taken and acknowledged, this 27th day of August, 1852, before me.

JOSEPH RRIDGHAM,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

28 Robert F. Sage and Frederick F. Lockwood, parties to the above stipulation, being duly sworn, doth depose and say, and each for himself saith, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ROB'T F. SAGE,
FRED'K F. LOCKWOOD.

Sworn to this 27th day of August, 1852, before me.

JOSEPH BRIDGHAM,
U. S. Commissioner.

Recorded the 27 day of August, 1852.

GEO. W. MORTON, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss.*

The President of the United States of America to the Marshal of the southern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States, for the southern district of New York, on the twenty-seventh day of August, in the year of our Lord one thousand eight
29 hundred and fifty-two by Henry Fitzhugh and others, against the steamboat Commerce, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamboat or vessel, her tackle, &c., may be cited in general and special, to answer the premises, and all proceedings being had, that the said steamboat or vessel, her tackle, &c., may, for the causes in the
30 said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said steamboat or vessel, her tackle, &c., and to detain the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the fourteenth day of September next, at 11 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the Honorable Samuel R. Betts, judge of the said court, at the city of New York, in the southern district of New
31 York, this twenty-seventh day of August, in the year of our Lord one thousand eight hundred and fifty-two, and of our independence the seventy-seventh.

GEO. W. MORTON, *Clerk.*

LUCIEN BIRDSEYE,
Proctor for Libellant.

32 Monition ret'ble 14 Sept., 1852.

LUCIEN BIRDSEYE,
Proctor for Libellant.

Filed Sept. 14, 1852.

I hereby depute Lorenzo De Angelis and John M. Rice, or either, to execute the within process.

Dated 28 Aug., 1852.

H. F. TALLMADGE,
U. S. Marshal.

In obedience to the within monition, I attached the steam
33 propeller Commerce, therein described, on the 28 day of August, 1852, and have not given due notice to all persons claiming the same, that this court will, on the 14 day of September, inst., (if that day should be a day of jurisdiction; if not, on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

H. F. TALLMADGE,
U. S. Marshal.

Dated 14 Sept., 1852.

To the Honorable Samuel R. Betts, Judge of the District Court of the United States for the Southern district of New York:

The Commercial Transportation Company, a company incorporated under and by virtue of the laws of the State of New
34 Jersey, owners of the steamboat Commerce, her engine, machinery, tackle, apparel and furniture, intervening for their interest in the said steamboat Commerce, her tackle, &c., appear before this honorable court, and claim the said steamboat, her engine, machinery, tackle, apparel and furniture, and state that they are true and bona fide owners thereof, and that no other person is the owner thereof.

And thereupon the said claimants pray that this honorable court will be pleased to decree a restitution of the same to them,
35 and otherwise right and justice to administer in the premises.

WM. G. COOKE,
President.

Sworn to before me, this 1st day of September, 1852.

JOSEPH BRIDGHAM,
U. S. Comm.

C. L. BENEDICT, *Proctor.*
E. C. BENEDICT, *Advocate.*

Endorsed: 10. 221. U.S. district court. Henry Fitzhugh
36 et al. vs. The Steam Propeller Commerce, &c. Claim.

C. L. BENEDICT, *Proctor.*

Filed Sept. 1, 1852.

U. S. District Court.

HENRY FITZHUGH et al.
vs.
THE STEAM PROPELLER COMMERCE.

We hereby consent that the above vessel be discharged from custody upon the claimant's filing a stipulation for costs and value, the latter in the sum of ten thousand dollars, to be executed

37 by the claimants, with Andrew D. Milick and Edward Cooper, as sureties, and paying into court the fees of officers of court.

The stipulation to stand in place of the vessel, and the claimants to appear and answer before the fourteenth of September inst., otherwise their default to be entered. September 1, 1852.

LUCIEN BIRDSEYE,
Proctor for Libellants.

The claimants consent to appear and answer in accordance
38 with the above stipulation, and waive advertising.

CHAS. L. BENEDICT,
Proct. for Clm'ts.

Endorsed: 10. 221. U. S. District Court. Henry Fitzhugh et al. vs. The Steam Propeller Commerce, &c. Consent to bond. Filed Sept. 1, 1852.

District Court of the United States for the Southern district of New York.

Filed the 1st day of September, 1852.

Stipulation entered into pursuant to the Rules and Practice of this Court.

Whereas a libel was filed in this court, on the twenty-seventh day of August, in the year of our Lord one thousand eight
39 hundred and fifty-two, by Henry Fitzhugh and others, against the steam propeller Commerce, her engine, boiler, &c., for the reasons and causes in the said libel mentioned, and praying that the said vessel, her tackle, &c., might be condemned and sold to pay the demands of the libellants; and the parties hereto hereby consenting, that in case of default or contumacy on the part of the claimants or their sureties, execution for the sum of two
40 hundred and fifty dollars may issue against their goods, chattels and lands; and whereas, also, a claim is about to be filed in said cause by the Commercial Transportation Company: Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or upon an appeal, by the appellate court.

WM. G. COOK, *President.*

A. D. MELICK.
EDW'D COOPER.

Taken and acknowledged, this 1st day of September, 1852, before me.

JOSEPH BRIGHAM,
U. S. Commissioner.

41 SOUTHERN DISTRICT OF NEW YORK, *ss.*

Andrew D. Melich and Edward Cooper, parties to the above stipulation, being duly sworn, depose and say, and each for himself saith that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

Sworn to, this 1st day of September, 1852, before me.

JOSEPH BRIDGHAM,
U. S. Com'r.

Recorded 1st day of September, 1852.

GEO. W. MORTON, *Clerk.*

District Court of the United States, for the Southern district of New York.—In Admiralty.

42 Filed the 1st day of September, 1852.

Stipulation entered into pursuant to the Rules and Practice of this Court.

Whereas a libel was filed on the twenty-seventh day of August, in the year of our Lord one thousand eight hundred and fifty-two, by Henry Fitzhugh and others, against the steam propeller Commerce, her engine, boiler, &c., for the reasons and causes in the said libel mentioned; and whereas the said vessel, her tackle, &c., is in the custody of the marshal, under the process issued in pursuance of the prayer of said libel; and by a consent, signed by the proctor for the libellants, it has been agreed that the said vessel be discharged from custody on the claimants executing stipulations for costs and value, the latter in the sum of ten thousand
43 dollars, as appears from said consent, now on file in said court; and the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of the claimants or their sureties, execution for the above amount may issue against their goods, chattels and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulator undersigned shall, at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above named suit may proceed, and upon notice of such order or decree, to C. L. Benedict, esquire, proctor for the claimants of said steam propeller, &c., abide by and pay the money awarded by the final decree rendered by the court,

or the appellate court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.

WM. G. COOK,
President.
A. D. MELICK,
EDW'D COOPER.

Taken and acknowledged, this 1st day of September, 1852, before me.

JOSEPH BRIDGHAM,
44 *U. S. Commissioner.*

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Andrew D. Melick and Edward Cooper, parties to the above stipulation, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of twenty thousand dollars, over and above all his just debts and liabilities.

A. D. MELICK,
EDW'D COOPER.

Sworn to, this 1st day of September, 1852, before me.

JOSEPH BRIDGHAM,
U. S. Commissioner.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the City Hall, in the city of New York, on Wednesday, the first day
45 of September, in the year of our Lord one thousand eight hundred and fifty-two. Present, the Honorable Samuel R. Betts, district judge.

THE STEAM PROPELLER COMMERCE, her tackle, &c., ads.
HENRY FITZHUGH et al. } 10. 221.

On filing claim, consent to stipulate and waive publica-
46 tion of notice; and the terms being complied with, on motion of C. L. Benedict, proctor for the claimants, ordered, that the appearance of the claimants be entered and that the vessel be discharged from custody, the stipulation for costs and value to represent the vessel.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the City Hall, in the city of New York, on Tuesday, the fourteenth
47 day of September, in the year of our Lord one thousand eight hundred and fifty- . Present, the Honorable Samuel R. Betts, district judge.

HENRY FITZHUGH et al.
vs.
THE STEAM PROPELLER COMMERCE, her engine, tackle, &c. } 10. 221.

The marshal returns, on the monition issued in the above entitled cause, that he had attached the steam propeller
48 above named, and had not given notice.

On motion of C. L. Benedict, proctor for the claimants, it is ordered, that the claimants' appearance be entered, and that they have ten days to file and perfect their answer.

U. S. District Court.

THE STEAMBOAT COMMERCE ads. HENRY FITZHUGH et al.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Charles L. Benedict, of said district, proctor for the Com-
62 mercial Transportation Company, claimants herein, being duly sworn, says that this is an action brought to recover damages for a collision.

That the answer in this cause was sworn to by the president of the said company, who was not present at the time of the collision, and had no personal knowledge of the facts; that from conversations with parties who were present, and who have knowledge of the facts, deponent is convinced that some matters are incorrectly set forth in said answer, and that an amended answer will be necessary properly to present the claimants' defence herein.

Deponent further says, that said company, the claimants herein, is a foreign corporation, and have no office within this dis-
63 trict, as deponent believes.

CHARLES L. BENEDICT.

Sworn to before me, this 7th day of April, 1853.
CHAS. ELLIOTT SCOVILLE,
U. S. Com'r.

On the foregoing affidavit let the claimants have leave to file and serve an amended answer herein within five days, without prejudice to the date of the issue.

SAM'L R. BETTS.

Endorsed: 10. 221. U. S. District Court. The Steamboat Commerce, &c., ads. Henry Fitzhugh et al. Affi't and Order.
C. L. BENEDICT,
Proct. for Clmt.

64 Filed April 8, 1853.

At a stated term of the district court of the United States of

America for the southern district of New York, held at the City Hall, in the city of New York, on Friday, the eighth day of April, in the year of our Lord one thousand eight hundred and fifty-three. Present, the Honorable Samuel R. Betts, district judge.

65 THE STEAMBOAT COMMERCE, her tackle, &c., asm. HENRY FITZHUGH et al.

On filing affidavit of C. L. Benedict, with the order of the district judge, and on motion of C. L. Benedict, proctor for the claimant, it is ordered that the claimants herein have leave to file an amended answer herein within five days, without prejudice
66 to the date of the issue.

Endorsed: Vol. 10, No. 221. United States District Court. The Steamboat Commerce asm. Henry Fitzhugh et al. C. L. Benedict, Proct. for Clmt. Order for leave to file amended answer.

Filed the 5th day of April, 1853.

To the Honorable Samuel R. Betts, judge of the District
67 Court of the United States for the Southern district of New York:

The amended answer of the Commercial Transportation Company to the libel and complaint of Henry Fitzhugh and De Witt C. Littlejohn, against the steam propeller Commerce, alleges as follows:

First. That the claimants are now, and were, at the time of filing said libel, a corporation duly incorporated under the laws of the State of New Jersey, and were the only true and lawful owners of the said propeller Commerce, her tackle, apparel, and furniture.

Second. The claimants admit the allegations contained in the first article of said libel, as to the ownership and employment
68 of the said lake boat Isabella.

Third. As to the allegation in the second article of said libel, that the said lake boat was, at the time of the collision, a tight, staunch, and strong boat, and was in every respect well manned, tackled, apparelled, appointed, and furnished, and in all respects competent for the business in which she was engaged, and had the usual and necessary complement of officers and men, and that the captain and men on board were on the look-out for the proper navigation, protection and safety of said boat, these claimants have no personal knowledge; but, as they are informed and believe, said allegations are untrue, and they therefore deny the same, and charge that said boat was badly constructed, and
69 weak; that she was not properly manned; that she had no

proper look-out, nor helmsman; that she was improperly managed, and carried light improperly; and that these faults, among others hereafter mentioned, caused the collision.

Fourth. The claimants admit that, at the time in question, the said Isabella was in a tow, towed by the steamboat Indiana; but deny, upon their information and belief, that said steamboat was in all respects well and sufficiently manned, tackled, ap-
70 parelled, and furnished, and in all respects competent for the business in which she was engaged, or that she had on board a full crew of officers, pilots, engineers, look-outs, and others, properly stationed and competent to manage and navigate her, or that the boats and other craft in tow thereof had on board the proper complement of officers and men properly stationed at the helm and on the look-out for the management and protection thereof; and the claimants charge that the neglect in these particulars, with the other faults mentioned herein, caused the said collision.

Fifth. The claimants admit, that on the time in question the said lake boat Isabella was being towed by the steamboat Indi-
71 ana, but deny that she was at the usual and proper distance behind, but charge that she was at an improper distance and out of a proper place, and that said tow was large and improperly made up, and that negligence and carelessness in the arrangement and management of the tow, and the boats therein, and the steamboat Indiana, with the other faults alleged herein, caused the said accident.

Sixth. The claimants admit, that at the time in question the said tow was ascending the Hudson river, and was met by the propeller Commerce, slowly descending the said river, but they deny the allegation that the said steamboat Indiana and all the craft in tow of her were on the eastern side of the channel of the
72 river, and in the proper place and position of said river and channel for boats so ascending said river, and charge that negligence and mismanagement in these respects, among other things mentioned herein, caused said collision.

And they also deny, that said Isabella, through negligence or inattention, or mismanagement of those on board of the propeller, or otherwise, was run into and afoul of by said propeller, but charge that the propeller was run into by the lake boat, and
73 that said collision was caused solely by the neglect and mismanagement of those on board and in charge of said steamboat and tow.

Seventh. The claimants admit, that the said propeller in safety passed the Indiana, and the barges ahead of the Isabella, but deny that after so passing she sheered suddenly to the larboard, or that she so moved towards the eastern side of the river as to run down the Isabella, but say that at the time of the collision the propeller

was in a proper place, and was backing, and that the lake boat by her own mismanagement, and that of the steamboat, and
74 the rest of the tow, was steered and dragged into and afoul of said propeller; that as to the allegations of said libel as to the lights, these respondents have no personal knowledge, and therefore do not admit the same, except as they are informed and believe the master of said Isabella was upon the forward part thereof, with a light in his hand, which remained there; and these claimants charge, that there was negligence on the part of said boat, barges, and tow in this respect, and that it was improper to carry light under the circumstances and in the manner in which it was done, and that fault in this regard, among other things,
75 caused the collision.

Eighth. The claimants deny the allegations in the seventh article of said libel contained, and say that the said collision was not caused by any negligence, inattention, or mismanagement on the part of the propeller Commerce, and that the same could have and ought to have been avoided by those on board and in charge of said steamboat and tow, and that the same would not have happened if those on board and in charge of said steamboat and tow had avoided the faults herein above charged, and been attentive and done what was in their power and their duty to do while navigating so narrow a portion of the river.

76 The claimants also deny, that any attempts were made by those on board said steamboat and tow to avoid the accident, and they deny the allegation that the same could not have happened had not the propeller altered her course and sheered to the eastward, or that the same was caused by any sheer on the part of the propeller.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore these respondents pray that this honorable court would be pleased to pronounce against the libel in this cause,
77 and otherwise right and justice to administer and to condemn the libellants in costs.

THE COMMERCIAL
TRANSPORTATION COMPANY.

CHAS. L. BENEDICT, *Proct.*
E. C. BENEDICT, *Adv.*

SOUTHERN DISTRICT OF NEW YORK, *ss.*

William P. Sherman, of Trenton, in the State of New Jersey, being duly affirmed, affirms and says, that he is the secretary of the Commercial Transportation Company, the claimants
78 named in the foregoing answer; that he has heard the same read, and knows the contents thereof, and that the same

are true, according to the best of his knowledge, information, and belief.

WM. P. SHERMAN.

Affirmed before me, this 11th day of April, A. D. 1853.

CHAS. ELLIOT SCOVILLE,
U. S. Com'r.

Endorsed: 10. 221. U. S. District Court. The Steamboat Commerce, her tackle, &c., ads. Henry Fitzhugh and al. Amended answer.

C. L. BENEDICT, *Proctor.*
E. C. BENEDICT, *Advocate.*

Filed April 21, 1853.

In Admiralty.

79 The replication of Henry Fitzhugh, De Witt C. Little-John, and James Peck, to the amended answer of the Commercial Transportation Company of the State of New Jersey, claimants of the steamboat Commere, Respondents.

These repliants, saving and reserving to themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said amended answer, for replication thereunto say, that they will aver, maintain, and prove their libel and complaint to be true, certain, sufficient in the law to be answered unto; and that
80 the same amended answer of the said claimants and respondents is uncertain, untrue, and insufficient, to be replied unto by these repliants, without that, that any other matter or thing whatsoever in the said amended answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove, as this hon-
81 orable court shall direct, and humbly pray as in and by their said libel and complaint they have already prayed.

LUCIEN BIRDSEYE,
Proctor for Libellants.

Endorsed: 10. 221. In Admiralty. U. S. District Court, Southern district of New York. Henry Fitzhugh and others vs. The Steamboat Commerce. Replication.

LUCIEN BIRDSEYE,
Proctor for Lib'lts.

Filed May 3, 1853.

United States District Court.

HENRY FITZHUGH and others
vs.
82 THE STEAM PROPELLER COMMERCE, Commercial Transportation Company, Claimants.

February term, 1853, Tuesday, Feb. 21. Collision on North river, at Castleton, 10 miles below Albany, Aug. 20, 1852.

Birdseye and Kirkland for lib'lts.

Benedict, Scoville & Benedict, for cl'mts.

Pleadings read.

For Liblts.

Gould S. Buckby (sworn): Lives in Albany; employed on steamboat Indiana, as master, in August, 1852. We towed boats between N. Y. and Albany. Left N. Y. 19th Aug., with a light tow; started with 7; left one at Kingston and took up 4 on way; had 10 at time of collision, all of them light but two; Isabella, (canal-boat), and Cleveland, (barge.) Had a barge each side of steamer; a barge tailed on the larboard side, and on starboard
83 side a canal boat tailed on, and four light-boats to one hawser, and canal boat and barge each had a hawser. Canal boat carries about 100 tons, and barge 4 or 500. Isabella canal boat was on our larboard side, and barge Cleveland on our starboard side, at end of 90 or 100 fathoms of hawser. Met Commerce 20th Aug., between 8 and 9 p. m. Witness was standing aft when collision happened; saw from wheel-house two steamers coming down, and then went aft to see to the tows. The Indiana was so well to the eastward that he gave orders to go no further east; was afraid should strike ground if they went further east; thinks the two in tow astern (barge and canal boat) were about in line with steamer; might have been a little further west;
84 cannot say whether those two were as far west as they ought to have been, but thought they were by ranging down to them from where he stood. Cleveland drew 6½ or 7 feet of water; was pretty well loaded, and could not go so near the shore as Indiana. Met Oregon and Commerce—first one passed 50 or 60 feet west of Indiana; Commerce also passed 70 to 100 feet to west; as schooner was then between her and Commerce, going up, wind southard, and her boom out; Oregon did not hit his tow; thinks she stopped. The night was a good one to
85 run a boat—not dark or light; when Commerce passed, boats attached next to those to side of Indiana thought she took a sheer to eastward. Capt. Hale was on larboard one of the two tailed on, and called out as Commerce passed him, that Commerce would run into Isabella and Cleveland. Witness said

he could not help it; had slowed his boat; witness then had *is* finger on bell-rope and pulled it to stop her; Commerce hit Isabella on bow; made a considerable sheer in hitting her; thinks Commerce was towing a barge; thinks on her starboard side; none on the other; and boat will not steer so steadily with only one boat attached to her side; not sure which side she had her
86 tow. In his opinion she would have gone clear, but for that sheer.

Wit. well acquainted with channel at that place—been so for 35 years; last 8 or 10 years it has changed from west to east shore; boats now go clear to east; should think there was then, being high water, plenty of room for Commerce to have passed to west of Isabella; channel 400 to 600 feet wide at place of collision, and river ½ a mile wide; thinks barge and canal boat were east of middle of channel; they could not have gone a great deal further east with safety; saw a light on Isabella; it was swung by somebody
87 before the collision, and then disappeared. Indiana was in good condition and well manned, and her tow was made up carefully and in usual manner; the two at the hawsers were brought together, and made up so as to make them narrow and aid in passing other boats; could not tell whether Commerce stopped her engine; thinks she has a high-pressure engine. If Commerce had kept her course after she passed Indiana thinks she would have gone clear of Isabella; might be 50 or 25 feet; cannot judge what distance; she might have sheered in 50 or 100 feet; witness stood as far back on promenade deck as he could get, and was on
88 a high place where he could see the whole transaction; heard noise of collision, and saw about time of striking; does not think Commerce had time to clear Isabella after Indiana stopped; after collision stopped Indiana and sent small boat down to Isabella; returned for answer that she was gone and there was no use for steamb at to go after her.

Cross-examined.—Took Cleveland and Isabella from N. Y.; they were alongside of steamer, one each side, and a small boat also; altered the tow at Athens to make it narrow for channel above; usually does so; did not change it again before collision. Indiana over 300 tons burthen; draws 5½ feet water. Tide
89 would rise at place of collision, with wind then blowing, say 4 feet—from 3 to 4; this was in mouth of Schodiack channel, at a place called Mull; was above Mull island; witness had headed over to eastward; he headed up above the island; Indiana about in range with island, and stern-tow was a little above the end of island; rang to slow as soon as he saw Commerce take a sheer; could see the land both sides of the river plainly. The pilot, John Van Orsdale, was at wheel; he was not the regular pilot; was put there in place of pilot was sick; was a good pilot; Steward was also in pilot-house; not sure but others; no duty to do there, but go there

of own accord to look on, &c.; saw light moving on Isabella after propeller passed him; light disappeared just before struck;
90 saw it swinging in hand of some person; heard no hail from any one except call of Capt. Hale to witness. There were persons on the tows alongside of steamer, and two next tailed on to them; cannot say there were on next tier of 4 boats; they were sheered to eastward, and from that expects some one was on board, and don't know anybody was on barge and canal boat except seeing light swung; the two last were about in line with stern of small boat on larboard side of steamer, and next one tailed to her; thinks none of these were outside of Isabella.

Elias P. Hale (sworn): Was capt. of barge John Adams; tailed to small boat alongside of steamer; has been on river 9 or
91 10 years steadily, until last year; was on barge Adams on evening of 20 Aug't—was sitting on the stern; saw propeller coming down, and when she came abreast of Indiana there was there a sch'r bound up, between her and Indiana, then, probably, 80 or 100 feet between two steamers; thinks if propeller had kept her course, straight down on her then course, she would have passed 50 feet west of Indiana; thinks she passed 50 or 60 feet west of Adams. Witness's boat was well in east, as he thought, and stern-tow was about in range with his boat; heard Capt. Buckby call out he was afraid to go further east lest he should get on shore; thinks there was room enough in channel for propeller to
92 have passed the whole tow without getting foul of it. Oregon passed down 80 to 100 feet west of witness; she was ahead of propeller, and stopped off to west off, and propeller passed between her and tow; thinks Oregon lay there at time of collision; propeller, just after passing his boat, took quite a sheer into the eastward. The 2d tier, (4 boats,) astern of him, were light and more to east than his boat; as propeller passed him she sheered into eastward, and wit. called out to Capt. Buckby, who was standing on stern of his steamer, that as propeller was going she would strike the two tows astern, and in a very short time collision occurred. Capt. B. replied he could not help it; he had stopped the steamer; should think, from his experience in that chan-
93 nel, it was wide enough at that spot for propeller to have gone west of tow; thinks her altering her course in that manner caused the collision; cannot tell whether she passed directly on; heard bell ring at about time saw a light swung on Isabella, and heard a hallooing below; could not say whether from propeller or the tows; heard a man sing out depth of water as propeller went by; wit. had usual complement of men on his boat.

Cross-examined.—Wit. was at helm of his boat; did not change helm at all from sunset till he reached Albany; no one on upper deck but witness; there was a man forward on lower deck;
94 the Oregon had slowed about the time she came abreast of

him; she stopped about ½ way between him and stern-boats lying off to west; propeller inside of her; thinks she overtook Oregon after latter stopped; Oregon passed him first, and thinks she was on stand-still off the tows; it is customary for passenger steamboats in passing tow-boats to stop their wheels and drift by, so as not to part their hawsers; is satisfied that Oregon had not passed Isabella at time of collision; been running a barge 9 or 10 years; in employment of Albany Canal Line; Indiana is owned by that line; thinks the channel in that place is between 300 and 400 feet in width; had not heard any bell ring before he spoke to Capt. Buckby; heard them a very short time after that, just about
95 time he heard the hallooing below; propeller carried bell and Indiana a gong; gave orders to engineer by gong; did not hear that strike; after passing Mull island steamer and her tows were straightened up the river, except barge and canal-boat, and those two had just began to straighten up to eastward; were getting past the island, and were working in line with steamer when propeller passed him; there is another island a little above where he was; channel runs eastward of that island, but west of Mull island; night not very dark; could see distinctly both shores; is of impression it was star-light, but don't remember to have noticed that; did not see the man on Isabella; saw the light distinctly.

Re-direct.—Could not tell whether Isabella was working
96 eastward at time of collision; did not see them make any way to westward, but thought they were in line with his boat, and as far east; could not say whether they could or not have gone further east safely; very shortly after Indiana slowed, he heard bell on propeller, but cannot measure the time. The other island above is a mile or two off and more westward; tows in passing each other never slow; it is only done by large passenger steamers; sloops go down between Mull island and the shore; witness was never down through it; has seen vessels lying in there at Schodiack; thinks Isabella was about in middle of chanel; perhaps a little east of it; should think there was room enough west of her for propeller to pass down; thinks propeller passed
97 him under full way; is not able to say whether she kept so till striking; bell rang previous to the striking.

(Feb. 22, recalled.)—Two lowest boats 90 to 100 fathoms astern of wit.'s boat, and wit.'s 120 feet astern of Indiana, and wit. was 90 to 100 fathoms from Mull island.

Charles Von Ostrom (sworn): In towing business 25 years; had charge of J. L. Rathbone at time of collision; a barge on larboard side of Indiana, directly ahead of John Adams; was standing on larboard bow of his boat when first saw propeller, and when she came abreast of him; a vessel west of him, between him and propeller; thinks propeller then over 100 feet west of him; can't give distance with any certainty; thinks Indiana and her tow was as

far east as it was prudent for her to go; the two stern boats
98 were bearing to eastward, although man at helm had his helm a-port; should think those boats then very near east side of channel, which there he supposes 300 or 400 feet wide; long acquainted with place, and has met a great many tows there; his impression is, propeller would have gone safely clear of all the tow, if she had kept her course straight down, probably 50 feet; saw her change her course and heading to east; considered her in straight course when she was abreast of him, but when midship of his boat, thought she would run across the hawser, and said to a man there would be a collision from the sheer she took, and her heading SE. or E. of S.; she held that course to the collision, as far as he saw, and he kept his eye on her, because he ex-
99 pected a collision, and thought the Cleveland was heading off east to keep clear of her; collision was very soon afterwards; had only to run length of the hawser; night not very dark; a good night for running; shore objects did not loom off so as to deceive sight. Oregon passed W. of propeller; did not notice distance; can't say whether Oregon stopped; supposes there was room W. of barge for propeller and Oregon to pass there abreast. If two boats are lashed astern as these were, the helm of barge would commonly be used—sometimes both—but should naturally use that of barge (Cleveland.) Propeller had a barge lashed
100 on one side—that would make a difference in her steering; it would be hard to break a sheer suddenly in such case. Had no connection in interest with Indiana; is connected with N. Y. and Albany line.

Cross-examined.—First saw propeller probably 2 or 300 feet off ahead; thinks propeller had a light up astern; was not on deck till called; that boats were ahead, and then came on deck; heard no hail till the collision from any quarter. It is very seldom that a steamer tows with only one boat on one side; has not for 20 years been attached in such a tow; has seen such tows frequently; has seen steamers tow with more boats attached on one side than the other.

Re-direct.—Frequently happens with propellers and others
101 attached to towing lines that steamers tow a single boat attached to her side; should himself think it more prudent to tow her behind with a hawser; cannot say whether propeller was under full headway; don't recollect of seeing any change in her speed, or seeing her stop before the collision.

Patrick O'Bryan (sworn): Laborer; been 17 years on Hudson river; night of collision was capt. of barge George Monteath; on starboard side of Indiana—attached to her side; saw propeller coming down; wit. was on upper deck, first at wheel-house; and as she passed, went aft on upper deck. Judge Indiana and her tows were well over on east side of channel—as far over as was

safe; east of centre could see Isabella and Cleveland; could not say he knows the channel well; his business does not require him to know the channels, but helps him to know them. Propel-
102 ler seemed to pass considerable distance west of Indiana; thinks over 100 feet; saw a vessel pass between them; saw propeller change her course, just before passing Jno. Adams, more across the river, and for the tow astern—not exactly straight across, but what he calls a pretty rank sheer; held course, in his opinion, till she struck the Isabella; observed her course after, because, from her course, saw she must run into the stern tow; watched till she struck room enough for her to pass clear if she had kept her course, should say over 50 or 60 feet W. of Isabella. When a canal boat is lashed to a barge, the helm of latter is generally used in steering; seldom use the helm of the other, but does not
103 lash helm of canal boat; saw Oregon pass 200 or 300 ft. W. of Indiana, as he judges; about same time with propeller.

Cross-examined.—Is in Albany Canal line; Indiana belonged to same line; judges channel to be 400 ft. wide at that place; tow-boats always have persons on board to steer, &c.; thinks saw propeller a mile or so off.

(Re-direct, Feb. 22).—Thinks was 8 or 900 feet above Mull island at time of collision, but cannot tell distance; saw Cleveland above it; can't say how far.

Re-cross.—Took notice, when propeller passed, of island and Cleveland, and could see she was above it just previous to collision; was much nearer to shore than to the boats below.

Wednesday, February 22—continued.

104 Gould S. Buckby (again): Had a red light at stern on a flag-staff, or else on the rail on promenade-deck—3 or 4 feet above deck—to indicate that she had tows in tow; light is so placed as to be seen by vessels meeting him when they get down to his bows, or abreast of him, and boats in tow astern can see it so as to know how to steer.

Cross-examined.—This red light is in a globe lamp; can't say whether it was on the rail or flag-staff that night; it is not raised so high as the signal-light; if on the staff, it was some below the rail; either way would be about even with the rail; in this case he is sure it was above the promenade-deck—though sometimes it is not; saw lights of propeller a mile or more off; was aft when
105 she came up to them, and did not see her hull till abreast of his boat. The light is placed astern as warning to vessels approaching behind; thinks Indiana was 8 or 900 feet above Mull island at time of collision.

James O'Bryan (sworn): Had charge of one of tows—scow O'Niel; that night she was in middle tier—one of 4 next behind

the steamboats; thinks she was inside; saw propeller coming down; the boats with which he was with were well over to east;
106 does not know but they might have gone closer to edge of channel; his boat drew 3½ feet water—two boats behind him; can't say whether they were as near east shore as they could go; propeller sheered from W. to E. when he first saw her; not a rank sheer; she was pretty straight, but going more to east; witness sheered more to eastward when he saw her coming, lest she should come close to him; as she was when he first saw her, she would have hit the boats, unless she had altered her course, as she was steering from west to east; there was sufficient room for her west to have gone clear; been on the river 8 or 9 years; has sailed vessels on the river; is somewhat acquainted with course;
107 heard bells ring (3 or 4) as propeller was about striking Isabella; supposed ringing was to slow and stop; was not in employment of persons connected with Indiana.

Cross-examined.—Was pilot of sloop and sch. from N. Y. to Troy part of two seasons; heard some grumbling that night about manner in which the two boats astern were steered; heard one of his men say they kept swinging about; they were about 200 feet astern of him, so as to swing clear of boats ahead; don't recollect seeing persons on board these boats that night; can't say whether it was dark or light at time; saw the shore; can't say if distinctly or not; never thought of that particular; could sheer his boats in good water 100 feet or more—perhaps not so much.

108 Re-direct.—Has often steered vessels through that channel; cannot say whether hawser of Cleveland was out from under his boat; did not himself notice sheering of two boats astern; was attending to his own.

(2 call).—Thinks the boats were above Mull island, but cannot say; witness's boat was above it; if his hawser had been cut off, supposes he should have drifted on to point of island, or into Schodack channel; could not go into that channel if tide was flood.

William Smith (sworn): Was steward on Indiana; was in pilot-house at time of collision; thinks steamer and her tow were east of middle of channel; knows steamer was; can't say as to steamboats; after collision had taken place went aft; was drawn there by ringing bells on steamer, and stern boats were then in
109 range with steamer and east of centre of channel: then took small boat and went astern alongside of Cleveland, and took off capt. of Isabella and one of his men; canal boat was gone, and two men then on Cleveland pursued down and overtook propeller in about 8 minutes, perhaps 500 feet from place of collision, to see if any men were lost; took two men and a woman from her remainder of persons who had been on propeller; hailed her several times, but she kept moving on; inquired name of propeller; some one answered the capt. was not on board; did not get her name

from anybody on board—held his light under her stern and read her name; her engine was kept in motion, and there was some bother in getting the name. There were men on the Cleveland besides those he took off; he thinks propeller would have
110 cleared the tow had she kept a straight course down the river.

Cross-examined.—Been steward of Indiana 3 years; did not notice propeller when she passed him; could see Isabella before collision, not after; did not inquire of Cleveland name of propeller; made no stop at her; knew it was a propeller by exhausting of steam; could not see her when he got to Cleveland, nor Isabella; was able, probably, coming up to her stern, to distinguish propeller 100 feet off by sight; could tell further off it was some kind of craft; hailed some time before coming up to her, "hollo for propeller;" received no reply that he heard; small boat then 5 or 6 feet from barge, which was alongside of propeller; might have asked what was name of this boat or of propeller; did not
111 ask name of capt.; cannot say whether answer, that capt. was not on board, came from barge or propeller; was then under stern of barge; heard no hail from tows astern before collision.

Henry B. Smith (sworn): Capt. of Isabella; saw propeller approaching and take a sheer towards him; she was 4 or 500 feet off when he first saw her; thinks she was not sheering towards him when she struck; was about 300 feet off when she began sheering towards his boat; was then fearful she would strike him if she kept that course, and hailed her as loud as he could to sheer
112 westward, or would be into him; had a light in his hand; can't say he swung it except by motion of himself; struck him in a very short time after she took the sheer towards him; can't say whether she attempted to stop; saw no attempt; came together with good force; blow parted lines of his boat attaching him to Cleveland; knocked in stern of his boat; drove it into cabin; water rushed in and sunk the boat; was lashed to Cleveland; capt. of Cleveland (Bayley, he thinks,) sung out to his man to port helm; he also sung out to propeller in a loud voice in about same words witness used; four men on his boat, including himself; that was full crew for her; cannot say how many were on Cleveland; thinks propeller could have gone clear if she had not taken the sheer in; cannot say if there was room enough for her to
113 do so.

Cross-examined.—First discovered propeller by her lights above Indiana, about opposite her bows; that is a passenger boat; when he came forward from stern-cabin he stood on bow-cabin deck; light was in his hand; kept it in his hand in walking forward, and in that way it swung in his hand; thinks propeller about 300 feet off when he hailed her; she was about opposite the tow-boats,

ahead of his, she was then standing towards him; did not notice whether she changed her direction after that; capt. of Cleveland hailed her after witness did; witness jumped on board Cleveland; is unable to distinguish whether Capt. Bayley hailed before or after witness jumped on board his boat; took the light with
114 him on board the Cleveland; saw Isabella when about half under water; was rowing past her in small boat; 3 persons got off his boat on to the barge towed by propeller; Cleveland kept on ahead; hawser not parted after collision; no light on his boat exposed to sight except one in his hand; not customary to carry lights on tow-boats; did not think so far as to hide it; no person at helm of his boat; it was lashed ½ way to port from midships; no person forward on bows of his boat but himself; was standing forward with light in his hand; when first saw lights of boats then took them for passenger boats; supposes he was there ½ an hour; propeller then was about abreast of Indiana; he stood there until he jumped on board the Cleveland. If his helm and that
115 of Cleveland had been put hard a-port when he first saw propeller thinks collision would have been avoided; cannot say whether his boat was west of middle of channel; not well acquainted with it; he could see west shore; did not see east one; helped raise Isabella; she sunk right in centre of channel.

Re-direct.—Was looking most attentively at Oregon when first came in sight; cannot say whether, if both helms had been put hard a-port, the boats would have been run ashore; first he saw of sheer in of propeller, when she was against 2d tier of boats; when he first saw propeller she was about opposite Indiana, or towards her stern; thinks if both helms had been hard ported, they would have got out of her way, but can't say whether it would have run them ashore; helm is usually lashed ½ port in that way for
116 the purpose of keeping her steady in steering, the barge being the steering vessel; Isabella sunk ¼ of a mile or more below place of collision; heard no answer from propeller to his hail; one man on look-out beside himself on his boat—James Carter, since dead; had a very high loading on deck, and took his light out in his hand to light a woman across the deck to her cabin, and after doing that he stood on his forward deck, and a few minutes after saw the steamer's lights; jumped from his boat to Cleveland for purpose of loosing his lines made fast to her; after Isabella was struck, went to stern of Cleveland, and then Isabella was then astern of Cleveland, about 30 feet; did not loose his lines; tried to do it, but could not; don't know whether Indiana had stopped her motion ahead; did not look at all
117 towards east shore.

Re-cross.—Carter stood on Cleveland about midships of Isabella; witness had sent him aft to look at the lines, and he was going to execute the order; had got about half way; usual to loose

lines on meeting passenger boats, to avoid their breaking by swell; his boat not fastened to hawser, but only to Cleveland, by fore and aft lines and spring-line midships.

Re-direct.—Carda was sitting on rail of barge Cleveland when witness sent him aft to look to lines, and it was more con-
118 venient for him to go aft on Cleveland than on Isabella to do it.

Peter Mullen (sworn): Was a hand on Isabella; was in the after-cabin at time of collision; when collision took place, came out and went forward and found Isabella loose lying crosswise in the river; wit. got on to barge towed by propeller; witness got off about midships of Isabella on to starboard bow of propeller's barge; the Oregon passed to west 25 to 50 feet off, whilst Isabella lay there in that position, and before wit. got off her; when he got to barge, a line was fastened to Isabella and passed to barge; witness asked people on propeller to tow Isabella ashore; they said they could not; said they were trying to do it; gave no reason
119 why did not do it; saw people on propeller sounding, after he got on the barge; can't say how long they continued doing it; saw them sounding immediately after he got on board; saw them sound three times—that he recollects; can't say how far Isabella was carried down by propeller; she was cast off before small boat came to propeller.

Cross-examined.—Witness was on bow of barge next side of propeller when soundings were taken on larboard bow of propeller; Isabella lay across the river when Oregon went past; began towing her directly; can't say how long after she came round by propeller; heard something said about soundings; man was using pole, and called out depth of water; don't recollect what it
120 was; recollects when capt. lighted woman into cabin, but can't say how long before the collision; might be 15 minutes or less; capt. stayed in cabin but a short time; thinks not so long as 5 minutes.

George Bealy (sworn): Was in cabin of Isabella at collision; on hearing out-cry, came out and in companion way; propeller struck second tier; when he got on deck, lines were broken; Isabella was going off aft from Cleveland; it was said Isabella was sinking, and they asked propeller to tow her ashore; witness got on to propeller's barge; Isabella was then lying across the river—not straight, but nearly so; Oregon passed whilst they were lying there, 20 or 25 feet—enough to clear them; asked name of propeller; the reply was that capt. was not on board; thinks
121 he saw 3 or 4 times sounding; asked to be towed ashore, and thinks they replied could not without running aground; Isabella was towed some distance, cannot tell how far, before she was cast off; should not think $\frac{1}{4}$ of a mile; thinks far enough to have taken her ashore.

Cross-examined.—Saw them sounding with pole, and heard report back the number of feet; thinks it was whilst Isabella was in tow by propeller, but is not sure; Mullen was with witness; wit. was a hand on Isabella; entered as cook, and helped load; don't recollect what depth of water was reported; capt. came in cabin with woman, only a few minutes before collision; blow was immediately after capt. left cabin; might have had time to
122 walk length of boat; thinks he and Mullen had lain down with pantaloons on; not as before; saw Isabella sink; was cast off from propeller when so far down in water as not to be manageable; she pitched down bows foremost; not entirely under water when left her, but allowed her sink; some part of her above water; don't recollect whether Isabella was towed bow or stern forward.

Hafez Bailey (sworn): Capt. of Cleveland; been on the river 4 years; saw propeller just before she passed Indiana; could not tell distance of his boat from E. side of channel; judged he was about in the middle; had passed the point of Mull island and straightened up; after propeller got by the Indiana she took a sheer
123 east—a pretty rank one, he thought—running pretty well across the river; she was *the* 60 or 70 fathom from him; wit. put his helm hard a-port and sung out to man on Isabella to do same, to try and clear propeller, which kept directly on the course to which she had sheered; wit. called a man to helm and ordered him to keep it hard a-port, and wit. ran forward and hailed propeller to keep off to westward, or they would come into them; called out in as loud a voice as he could twice or three times; a man from Isabella had hailed twice previously, in loud voice; did not see that propeller minded the hail at all; held directly on her
124 course; might be 10 minutes after she took the sheer before she struck the Isabella; there would have been no collision if she had kept her course before the sheer; thinks she had time to change it after she was hailed; does not know how she steered; did not see that propeller stopped at all, on the collision; remarked upon it afterwards; stood forward on the promenade deck, where he could see whole transaction; should judge she had plenty of room to pass west of him; 'twas perhaps 200 feet above Mull island at time of collision; thinks he was east of middle channel at time of collision, not west; his boat drew 6 feet 10 inches that trip; witness acquainted with channel, but rule was to follow steamboat towing him; his boat steered well; witness had taken the
125 helm ½ or 1 hour before the collision; witness heard no reply from propeller to hails; saw no person on her deck at time; thinks could have seen a man standing forward on her deck; his attention was particularly directed to her, because he judged, if she did not alter her course she would run into them; had two men on his boat, besides himself, her usual complement; barge does steering, when canal-boat is lashed to her; hawser given to

barge, and then helm of canal-boat is lashed ½ a-port, unles she has another boat outside of her; saw a light in the hand of one of the men on the Isabella; he was walking along with it; did not his swinging; no stationary light on her bow that he noticed; she was well lashed to his boat; witness's boat is staunch and
126 strong and well conditioned for navigation.

Thursday, Feb. 23—continued.

Witness, (in continuation): Saw Oregon pass down almost at same time with propeller; she was outside of propeller and Isabella, not far west of latter.

Cross-examined.—The man he called to helm was forward at time; saw him at time; some man had it previous to witness; had no connection with libellants or Indiana line; saw no person on the deck of propeller.

Re-direct.—Observed man he called to helm; obeyed his orders and kept it hard a-port.

127 Peter Mullen (again): Saw where propeller sunk; it was about a quarter of a mile below the point of Mull island; thinks collision was about as far above the island; helped to raise boat; she lay opposite Mull's house.

Cross-examined.—Did not take particular notice of point of the island at time of collision, so as to fix its distance off; is now in employment of libellant's line.

Re-direct.—Is watching boats under Mr. Littlejohn's employment.

Defence.

Elias Crapser (sworn): Knows Aaron Hill, of Albany, civil engineer and surveyor; the map produced was made by him;
128 witness assisted him; it was made from actual survey on the ice; the map is correct; has been on it 22 or 23 years on various vessels, and is acquainted with tows; cut holes through the ice and sounded to find the spot; wit. knew before, its position, but this was done to satisfy Mr. Hill.

Cross-examined.—Survey was made between Christmas and New Year; pencil-marks were made on the map a week ago last Monday; witness saw Mr. Hill put them on; helped him with them; the channel changed 8 or 9 years ago; the line of spot was measured all the way on the ice; does not know whether the pencil-mark was made from scale; Mr. Hill took down notes of
129 measurements, and drew off the map according to those notes; channel becomes more shoal every year, but change has not been material last two years; sounds there every year in passing up and down; thinks cut 20 holes across the river, and cut a good many lengthwise up and down the river; did not take the number; subpœnaed witnesses, last Monday, for def'ts; in their

employment 3 years; sometimes runs a propeller as master; is not a surveyor or engineer; first and second year was capt. of Swan, and next year on Cygnet and Swan, and Paterson last season.

Alexander Wilson, (sworn): Was pilot of Oregon at
130 time; was in the wheel-house, behind propeller; saw Indiana; was west of her; night was dark; had it been thicker, should not like to have run; about high-water—required that to pass the bar. Did not see the two rear tow-boats until he got alongside of the 4 boats above them; thinks about 50 fathoms between those boats; when he first saw those two last boats, they were just below point of Mull's island and west side of channel, and the 4 were east of them; when he first saw a light on the two stern boats, thought it a vessel at anchor, and headed to go east of them. Propeller was then directly ahead of him; he came up and lapped on her starboard quarter, but found there was not room to pass her on that side, and stopped and headed her to east of propel-
131 ler, intending to go east of the light he saw and supposed to be a sloop at anchor; as got lapped on that side, propeller rang 4 bells, and then witness rang his bells and went back, supposing something was matter; as propeller passed Indiana and got down to first tow, she saw no change. It was necessary to so head, for that was the range of the channel, and she was compelled to go eastward to avoid the sand-spit. Heard boat strike; they were directly under his bows, but so dark that he could not exactly see them, and was backing out of the way; he did not pass the propeller till after the collision; the boats were pretty well to westward in the channel at time of collision; did not expect
132 to see light on tow-boat, and seeing light deceived him and made him think it was a sloop at anchor, until saw it cross propeller's bow to eastward, and then knew it was tail of Indiana's tow; propeller rung to slow and stop before Oregon did; that was done as soon as tow turned east; before that, tow was hanging out way, to west of channel; if they had been following their tow, they would have been 150 feet further eastward. Witness has been a good deal in towing and steering; it is usual for boats lashed as the two stern boats were, for boat to lash her helm part way, as in this instance, for the barge does the steering in deep water, but in narrow channel generally have a man
133 stationed at helm of each, to steer as directed; with a man at helm of each, these boats could have been steered clear off to eastward, the width of channel; the least water was east of them; wit. wanted to get in there with his boat; she drew 8 feet water; did not see Isabella that night after collision; seen her wreck frequently where she sunk, and generally went to east of her; sometimes went west; can run close to Mull island; has run up along within 25 feet of it; thinks the spit is marked on map too far south; thinks Isabella was hanging out so far, that she

could have gone west of point of spit, and would have brought up on that bar if she drew much water.

Cross-examined.—When abreast of Indiana, he was probably
150 feet astern of propeller; came directly up to her; when
134 against 2d tier of tow, ran fastest; was close on her, on her starboard quarter, when she took a turn eastward, and within a minute or two propeller struck the tow. Witness had only time to back off and get on the other quarter before she hit; passed down west of her, after propeller shoved Isabella out of the way, close to her; does not think the collision was more than 100 feet above point of island, and as much as 300 feet west of island; ascertained that tow was not a sloop at anchor when she came out eastward and showed her light; that was immediately before the collision, might be a minute; thinks they struck about the time
the bells had done ringing; had not time to back her; did
135 not see red light on stern of Indiana; does not look for stern light when meeting a tow; passed Isabella when propeller had hold of her, and Oregon was then 350 feet west of point of island, and as far west as he could go; Isabella was then shoved down to place where she sunk; it was 4 or 5 minutes being done; from 150 feet west of centre of channel across channel to island, about 200 feet. From the best of his knowledge, the Isabella was not over 100 feet above island; cannot tell from experience how
long it would take to shove her across the channel, but
136 should think it could be done in a minute or a minute or two; judges the hawser towing Isabella was 150 fathoms long; considered it very long; could not see point of island when abreast of Indiana, but did see it when vessels struck, as he was then able to determine which way he was to go; considers his eye-sight good; was not prevented passing propeller by her veering about and steering badly before getting to Indiana; kept behind on account of Indiana and her tow; did not overtake propeller till got to 9-mile tree; propeller kept steady course; Oregon would run 4 miles to one of propeller. Witness lay still till Isabella was shoved out of her way by propeller, and then went by her;
thinks Isabella sunk ½ width of channel or more east of
137 place where she was struck. Supposes collision was caused by propeller mistaking Isabella for a sloop at anchor, as he did, and trying to go east of her, being deceived by her light. If propeller had not hit her, Oregon probably would, for should not have had time to get out of her way; propeller did not make a rank sheer to the east, but bore that way to escape to the sand-spit, and vessel supposed to be at anchor.

Re-direct.—Indiana was pretty well east of channel, and if the barges were in line with her, and not hanging off to westward, they would have been also to eastward. A vessel going up passed between Indiana and propeller, and also Oregon, with a

138 light air from south; she did not intercept view of Indiana below; might have been 8½ feet of water when abreast of first tow; was close to the bottom; 100 feet west of that not over 6 feet at high-water, in some places 4½ and 5. At time of collision, thinks Indiana was rather heading out to west; was well in to east of channel, and must come out to pass point of land above. Channel, he should judge, was SW. and NE. at point of island; never took range by compass; natural course of tow would have been to have headed NE., as Indiana did, to get round the point of island; supposes after that Indiana came out west, but did
139 not look back to observe her course.

Thomas M. Wilson (sworn): Navigated river 32 or 33 years; was on the Oreogon at wheel at time of collision; came up with propeller below 9-mile tree, on west side of channel; Oregon was in her wake; once lapped on starboard quarter; stopped and backed off, as he supposed, for want of water enough to pass on west side; knows the water there, and does not think there was enough water for Oregon to pass west of propeller—then near stern of first tow—to hawser of Indiana; saw a light below on west side of channel, and supposed it a vessel at anchor; just as collision took place, observed light to range from west to east, and pilot said he believed it stern-tow of Indiana. Witness said it could hardly be so far astern; that was just as collision took place; propeller then just about in range ahead of Oregon, and both on west side of channel; bells rung immediately, might say almost same instant, as it was discovered what light was; rang to slow, stop, and back, and then collision took place; can't say he actually saw collision; thinks propeller partly covered the boat, and it was pretty dark and hard to discover objects off; did not pass propeller till after collision; stopped and waited a few moments before passing propeller, and then went on; passed her to west, and thinks she had worked in to the eastward; supposed she had the wreck in tow; did not see it sink; has seen where she lay since; thinks she sunk in same point in channel, but rather higher up than
141 pointed out by Pilot Wilson; channel runs as he marked it—thinks 6 or 700 feet below the point of the island; after collision propeller made more room for Oregon, and enough to enable her to pass west—but not as far to west as she could probably go—and supposes, to do that, propeller had worked in eastward. The light was not in a straight line with Indiana; she was east of Oregon, and this light opened west of propeller; that light proved to be on one of stern-boats of tow; thinks tow was
142 out of its place and too far west; if it had been as near the east side, thinks the vessels would have gone clear; towed vessels do not show lights, except it was in cabin door—not a light like the one seen; should take such a light as giving notice of a vessel at anchor.

Cross-examined.—Deepest water is nearer point of island, and considers point where Isabella sunk was about in centre; good water in towards east shore above island; a small flat sets off the shore; stopped Oregon to avoid hitting propeller; Oregon then heaved about straight down the river when met Indiana; propeller same, but varied her course a little east in passing; when Oregon passed first tow, tried to go west of propeller, then stopped and attempted to go east of her; the course of channel there N.
143 easterly and S. westerly on a range above point of island; where they passed Indiana, there was not water enough for O. to go west of propeller. The collision took place a little above the point of the island, should think about 100 feet; don't know the scale of map; when Oregon was abreast of Indiana, the tow had not passed the point of island. In his opinion, when he first saw light of tow, Oregon was in a line west of her; did not see the light moving, as if in hands of man; saw a vessel pass between him and Indiana with sails up; she did not shut off view of stern-tow; Oregon was to west; she might have been between O. and tow in coming up, but he had not then seen light of
144 tow.

Re-direct.—Thinks Oregon might have been 6 or 700 feet above point of island when he first noticed the light; then thought it a vessel, and that he should go east of her; at the place of collision, there was room for the stern-boats to have gone further eastward; propeller was then on the west side of middle of channel, and there was room enough for Oregon to have gone east of propeller at place of collision; boat sunk further east than place of collision; had she been then as far east, the Oregon would have passed propeller without stopping or waiting; thinks it is customary in narrow parts of river to have men stationed at helms
145 of tows; with that length of hawser the stern-boats might have been sheered ashore if they had way enough through the water.

Re-cross.—It is proper to take helm of canal-boat if alongside of a barge; the steering could be done by barge; point of island was off larboard bow of Oregon; light was seen off her starboard bow; nor was it at time of collision on his larboard bow that he saw; don't recollect noticing it there.

146 Re-direct.—Would have better control of boat in narrow navigation with a man at her helm to obey orders, than by lashing helm and depending on a barge to steer her.

William Moody (sworn): Engineer of propeller; was in engine-room at time of collision; 4 bells rung in quick succession, ordering to slow, stop, and back; obeyed promptly; got the engine working back before the blow, and made ten or twelve turns back.

Cross-examined.—Those turns would check her way some—not much—with loaded barge; capt. of propeller, William Lennox,

was on the boat that night; does not know in what part of the boat he was at time; commanded her from time she
147 was built, 1½ year; same pilot on board that had been with her all the season.

Edward Blake (sworn): Followed North river about 30 years, on steamboats and sloops, as hand; was in scow John Bloomer, attached to first hawser, towed by Indiana; was starboard boat of the 4; was aft, at tiller; saw propeller come down on west side tow; was on east side of channel when propeller passed them; heard bells of propeller; his boat was then about off mouth
148 Schodiack, and thinks he was a little above point of Mull island, but not much; calculates Isabella was opposite the point at time of collision, to west of him, and not directly following the steamer, and seemed to be pretty well over towards the sand spit; after she had been right after him, where she ought to have been, she would have cleared propeller and Oregon; there was sufficient water where he went; the night was pretty dark; did not see a man on Cleveland, and does not think it light enough to see one there; hawser of Cleveland swung clear of the 4 boats; they were all light; there ought to be a man at helm of every boat, for working in narrow places; if helms of Cleveland and Isabella had been both put hard a-port at the time propeller
149 passed him, they would have sheered enough east to have avoided propeller; thinks Indiana did not stop her way before the blow; witness's boat was under way; did not see any rank sheer of propeller to eastward; her course was down the river as she passed him, and just after, she took a little shear to eastward; can't recollect how soon after passing him bells rang.

Cross-examined.—He was pretty well over to east shore; had no load at all; did not take notice how near east shore he was; when sees anything coming above, sheers off pretty well to get away from them; heavy loaded barge would not work quite so quick; the hawser between him and Indiana supposes was about 50 fathoms, and judges about 40 fathoms from him to Isabella;
150 the mouth of Schodiack channel is above the point of Mull island, and may be 4 or 500 feet; cannot tell distance; he was east of point of island when propeller passed him, but cannot say far; not much experience at that place; propeller sheered very little to eastward after passing his tows; did not hear any hail from steamboats after propeller passed.

Re-direct.—Thinks collision took place N. W. of Mull's island; his boat was not east of it farther; did not understand question at first; points on map, at about place of collision, and his position as he understood it.

Friday, Feb'y 24—continued.

Charles Blake (sworn): Between 7 or 8 years on river; was on

barge George Bloomer, (with Edward Blake;) night was
151 dark; propeller was on west side of channel when she passed his boat; was straight up behind Indiana, a short distance above head Mull island; saw collision; Isabella and Cleveland were then west of him, and not following behind his boat; had they kept course wit. was on, and strait ahead with him, there would have been no collision; nothing to prevent them doing so; best depth of water is along above, and east of, Mull island; saw propeller as she passed him; bear off rather eastward, but of no account; she made no rank sheer; not light enough to enable him to see a man on Cleveland; did not notice hawser touching his bottom; thinks was not enough of it to ; generally in his ex-
152 perience a man is placed at helm of each boat in work; had both these boats put their helms hard a-port, might have kept clear of propeller; and they had water enough to do it; could not say positively whether Isabella was above or below Mull island at time of collision; did not notice particularly, but judges from his own position, and length of hawser, that Isabella was about abreast of point of Mull island; never saw the wreck after that night; his boat was going ahead at time of collision.

Cross-examined.—Son of last witness; heard his father's testimony yesterday; cannot say how far his boat was in towards east side of channel at time of collision; not past the centre; might be about in it; propeller sheered to eastward, just as she got a little
153 by his boat; cannot say if propeller could have avoided Isabella by porting her own helm as she passed him, because cannot tell how far over to west the hind boats were; does not think she could have gone west of those boats, nor that there was water enough; cannot say positively the depth of water 200 feet west of propeller; has been aground along there, and sounded at various places along there; cannot say he did exactly at that place; supposes those boats were 40 to 50 fathoms astern of him; others know that channel better than he does; cannot tell
154 exactly where the spit lies there; he did see head of Mull island, a little way above it, but cannot tell the number of feet or fathoms, as it was dark; could not say if Cleveland was above or below head of island; but she was well over west of it, towards west bank.

Alexander Wilson (again): Shoal water from point of Mull island, running from 2 feet to 6 feet of water about 200 feet from the island, and there begins the mouth of Schodiack channel. The meeting of the vessels and collision were all to westward of that shoal; the Oregon nor propeller were not at any time on east side of that spit or shoal over into Schodiack channel. The
155 soundings shift on those shoals every day or two, so that vessels passing one day will ground on them. Rule of navigation in that in coming down, is to run pretty straight

from point below 9-mile tree for head of Mull island, and then bear off west of it; never east, unless crowded in by other vessels; and also take the reverse line going up, when no impediment in way; knows Groesbeck, a pilot; his reputation as a pilot is good, he believes; his track down that night would have been a little more east, if other boats had not been in his way.

Cross-examined.—10 feet water at that place at high water, with south wind, at head of Mull island; but tides vary very much; over the shoal might be 4 or 5 feet; should think Isabella,
156 from state of tide, must have had 6½ to 7 feet water; propeller, with only 1 barge on a side, affects her steering, and inclines her over to that side; does not think propeller could have got clear of Isabella by sheering west without going ashore.

Simon Groesbeck (sworn): Been pilot or master on river since 1824; was pilot of propeller that night; was on her that whole season; she was a new boat that season; it was 2d trip of propeller when collision occurred.

(*For Libellants, by consent.*

William D. Frazer (sworn): A survey was made of river;
157 map in court; was compiled from a great number of previous surveys by various surveyors; soundings were taken in 1852 or 1853, as he supposes, but cannot assert positively were made at time; the map is intended to represent exact soundings and lines at time; thinks the soundings on parts of river most liable to change are the most correct; others are probably taken off without so much care; freshets make changes, but he believes this map correct for that time.)

Mr. Groesbeck (in continuation): Left Albany about 6 p. m., with barge in tow, on starboard side; witness was at wheel; Thomas Vendrom was look-out on propeller; Jackson Frybee was master of barge; night was rather dark; judged it about high water when he got down to 9-mile tree; passed on west side of Indiana, about 400 feet above Mull island, as he judged; saw that she had a tow; lay over as far west as he dared to go, and held his course straight down the river; saw a light ahead and vessel; appeared to be well in to west of him, and supposed she was at anchor; when he first saw the light, it was west of his flag-staff, over 150 feet; witness was then about half-way between Indiana and her 2d tow; did not discover that light was not on an anchored vessel until propeller passed that tier of tow; discovered it then, by its taking a
159 rank sheer to eastward; wit. then stopped and backed; when about abreast of first hawser (2d tow), turned his wheel over about 2 spokes—a-starboard; but before he could observe any change of his course, observed it was a tow, and stopped immediately; having barge on starboard side, prevented propeller answering helm and sheering a-port so soon; effect of stopping

propeller with barge on starboard is to cant her head to lar-
160 board; judges she then swung around six feet; should not think it more than 20 seconds after he rang to back before the collision; his attention was directed to the light, and did not lose sight of it; there was not room west of it for him to pass. Cleveland and tow did not stop after collision, but passed on east of him; does not think way of propeller was stopped much; does not think she backed over 10 seconds; Isabella was made fast to his barge, and he tried to pull ashore on Mull island, upon a small sand-spit setting off the island; thinks he towed her 15 minutes after he got hold of her, and about $\frac{1}{8}$ of a mile distance; she sunk east of the place of colllsion; think propeller was going about $4\frac{1}{2}$ miles per hour, by the land from Albany, till collision;
161 the Isabella was not following behind Indiana and 2d tow. If she had followed that, she would have passed 100 feet east of him. The collision was 50 or 100 feet below the point of Mull island; not proper for a tow to show a light as Isabella did; every boat in tow in such a place ought to have a man at the helm; thinks if helm of each boat had been put hard a-port, she would have gone clear; a sheer of 6 feet would have been enough to do it; the Isabella could have gone within 10 feet of island that night, where collision took place. If Indiana had stopped, the vessels in tow would have had slack hawser, and could sheer off more rapidly.

Cross-examined.—That was 2d trip of propeller; she
162 steered as easily with barge at her side as without it; does not know whether a man was at her helm at time; does not know that her helm was lashed that night, except by steering his own boat; judges it was so that night from steering of his own boat, but did not see it done; propeller draws $6\frac{1}{2}$ to 7 feet; has been through Raritan canal with 7 feet water; propeller ran to Philadelphia; did not see master of barge in his tow at time of collision; Vendrom was at pilot-house, by witness, standing at corner of door; a sch'r passed between him and Indiana going up; she did not obstruct his view; saw between her sails; wit. was then 100 feet west of Indiana; schooner's sails rigged fore and aft, and had no wind; was worked with sweeps; did not see a light
163 on stern of Indiana; did not slow or stop, because had room enough where he met Indiana; the light he saw moved from west to east; was all of 400 feet from it when it first came in sight; thinks would have been collision had he stopped then—Isabella crossing his bow; hove his wheel right abreast of 2d tow; he did not touch the bottom at time of collision; supposes there might have been 8 feet water there, but 6, 8, or 10 feet west of that; in his judgment not depth enough for propeller; water varies on west of island irregularly and suddenly; heard some one halloo at about time of collision, before actual striking, but could not tell where from, nor what was said; did not get Isabella to sand-bar to which

he was trying to tow her; towed her S. E.; she was on his
164 starboard side, against barge; it was said she was partly filled and sinking, but did not see her himself; her condition did not have effect to draw him more west; channel was about S. W. and N. E.; the light, when he first saw it, he thought, was moving as if carried, and was then set down and remained stationary; it was not customary to have lights on deck; has often seen one carried across the deck; might be done to find way across deck, or look for something, or carry it to hang up in rigging on coming to anchor; such light when seen is never understood to be a signal that the vessel is moving; a loaded barge will sheer
165 further, but not so quick as one light; spit was up about 100 feet above point of island; never saw the wreck afterwards.

Thomas Vendrom (sworn): Was on look-out on propeller at corner of pilot-house on upper deck, and close to forward part, not more than 6 inches from front of deck, about 30 feet aft of her bow; that was best position on boat to see anything coming up; night pretty dark; somewhat cloudy; occasionally breaking away; when passed Indiana was above point of Mull island, and standing straight down the river; saw first tier behind Indiana; had short hawser; was then about 100 yards west of the point of the island; nearly opposite, but not quite down, to island; could see
166 bearing S. E. of him; saw light below when he got abreast of 2d tow; it was bearing west of him, and a considerable distance west of 2d tow; pilot asked wit. what the light was; witness said he thought it a vessel at anchor; shortly after discovered it was part of the tow; one thing was, he saw hawser raise up and splash down in water; could hear it; pilot had hove his wheel a little to starboard, but did not see she sheered any; thinks barge on her side balanced the move of wheel; has a gong on propeller, a very large one, for signal to engineer; observed light of tow shift a little to east, but it was then too late for either to shun the other; as quick as it was seen it was a tow, signal to stop and back
167 given; did not see Cleveland stopped at all; passed up; Isabella's stern struck propeller about 6 feet from the stem on starboard side; thinks rubbed on guard of Cleveland; witness took line from Isabella; thinks Capt. Lenox passed it to wit.; he was on her to see what her damage was; towed her S. eastwardly; could not go exactly east towards Mull island, because both boats were on starboard of propeller; towed till she was so sunk could do no more with her; then cast her off and passed down; heard a hail from one of these two tow-boats 2 or 3 seconds before collision; it was then too late to do anything.

Cross-examined.—Mull's island is low land; a barge is higher out of water than the land; schooner coming up had not
168 intercepted view below; when abreast of Indiana was 30 or

40 fathoms above the island; supposes pilot turned his wheel to go east of tow.

William M. Lenox (sworn): Was master of propeller; was in his room lying down; his watch was below at time of collision just aft the pilot-house; first he heard was orders to stop and back the boat; immediately went out on deck and saw a collision would take place; boats struck within 10 seconds; the tow did not stop at time of blow, but did afterwards; thought his boat was well to
169 westward of channel from the notice he took at time; first thing he did was to take a light and examine the Isabella; her head swung off a little east from below; had a line made fast and towed her till she was almost under water, and till he could get her no further; then passed off to east of her; supposed she sunk well west of channel, but there was a good deal of excitement, and his attention was more given to helping save the boat than examining the bearings of place; Groesbeck is a good pilot; thinks there is none better; is not now in the employment of claimants, nor in Vendrom.

Cross-examined.—Should not like to have gone 6 feet farther west that night; cannot assert the fact, but should expect to go ashore by doing so; did not see Indiana stop; it was dark, and she was too far; had not heard her bells ring; depends on circumstances whether master be on deck in a narrow place; it was not his watch; on their boats they go according to watch; he did not consider that a difficult place; been on the Hudson river between Albany and Philadelphia about 8 years.

Re-direct.—Saw Cleveland pass on; could not see Indiana; held watch and watch with the pilot; takes wheel when he quits; is pretty positive he heard bells of Indiana after he came on deck, and about time of collision.

171 Re-cross.—Did not pay any attention to Oregon; can't say whether he heard her bells ring at all; was 20 feet from him, and he supposes 50 or 60 fathoms from Indiana.

Simon Groesbeck (again): Has seen mark of blow on bow of propeller, 3 or 3½ feet from stem; he is not now in claimants' employment.

Jackson Sailor (sworn): About 3 years on North river; that night was on barge Tacony—master of her, (towed by propeller); saw Indiana and 2d tier of tows; thinks his boat was pretty
172 well to westward of channel; is not a pilot; was on deck looking out; saw the light on tow—it bore to west of his flag-staff; thought his boat was going straight down the river; thought it was light of a vessel at anchor; light was out of his view when he discovered it was a tow of Indiana; thought he afterwards saw the light; propeller changed her course a little to eastward, about time she was abreast of 2d tow, or at their sterns; about same time heard bells of propeller; saw the wake of 2d tow

of Indiana, and judged the stern tow was 100 feet west of that; after collision got lines to Isabella, and tried to haul her on to a little spit; the said was there; propeller headed to east;
173 towed her till she was chiefly under water; had the tows been in wake of Indiana, should have gone clear of them as propeller was going.

Cross-examined.—Indiana was pretty well towards eastern shore when he was abreast of her; thinks passed 150 feet west of her; don't know enough about the channel to say whether he was then in the middle of it; thinks Isabella struck his barge first, and then glanced off and hit the propeller; she came in between the two, and his impression was she hit Tacony 2 feet from her larboard stern, and then glanced over to starboard side of propeller; his helm was lashed 4 spokes a-starboard that night; that
174 would move the helm about 6 inches; probably a little less; witness was close at hand to take the helm if ordered; caught by a basket; could be loosened in an instant.

John Hillegan (sworn): Been pilot and master 10 years on river; saw place Isabella sunk; was lying at brick yard ¼ mile below; thinks it lay about in middel of channel, a little west if anything; boats going by passed it to east; could pass either side; east side was best water; not usual to have light on a boat towed; a light is generally considered a signal that vessel is at anchor; not in towing business.

Cross-examined.—Supposes the wreck lay 400 fathoms
175 (⅛ of a mile) below point of Mull island; when vessel is anchored, light does not usually move except from rolling of vessel; never allows a man to walk about deck with a light; should not suppose a vessel at anchor if he saw a light moving about her deck.

John Miller (sworn): Waterman 28 years on North river, most of the time master of sailing vessel; if he sees a light shine from a vessel, supposes she is at anchor; not customary for a stern tow 100 fathoms from steamer to show a light; in a narrow place like that in question, it is not prudent navigation to go with
176 helm lashed; it ought to be manned; soundings are changeable in that place; sandy bottom.

Cross-examined.—Been in the towing business only the last year; not unusual for a man to be carrying a light across deck before it was hung up; and should suppose she was at anchor if a light is moved about the deck.

For Libellants.

Capt. Van Ostram (again): Not usual to have a steady light on a stern tow; but frequently is shown to warn a boat approaching that a barge is in the way.

177 Capt. Bailey (again): As Isabella was situated, witness

would have taken a light and swung it to show when a vessel came near to her; it is not customary to have a stationary light; but when steamer is coming on, should not do except in case of extremity, and that could not make himself seen.

Capt. Buckby (again): Proper to show a light on Isabella when steamer came near to her and then put it away; it is done as warning to steamer; has seen it done frequently, and steamer
178 steers away from tow; if had seen tows out of place should have hailed them; did not that night, or have any occasion to do it.

Capt. Hale (again): Thinks under the circumstances it would be proper for the Isabella to show a light.

For Claimants.

John Van Orsdall (sworn): Was pilot of Indiana that night; has been about 30 years on the river; was in the wheel-house, and could not see whether the big tow followed in his wake;
179 when the bell rang to stop, he looked out and seen the tow out of larboard window; vessels altogether then; always calculates a vessel is at anchor if he sees a light on her.

Cross-examined.—Never show a light as a warning, unless in a very dark place; common, after vessel anchors, to bring out a light from cabin, and should expect that to be so if he saw a light; Indiana was pretty well to eastward; might have gone a little further east; was east side of channel; was just above the island; thinks he was 4 or 500 feet above the island at time of collision; could have steered his boat if the long tow had been 150 feet
180 west of his wake; if tow had been heavy might have had some effect on his boat; told capt. he supposed he had stopped because the tow had steerd ashore.

To the court.—When he looked back he saw the point of Mull island, and the tows were then west of the point of the island; cannot tell the distance off.

Re-cross.—The island bore right along his larboard quarter, and those tows might have been 100 or 200 feet west of it; same between them and island.

Testimony closed.

Friday, Oct. 13th.

181 Mr. C. L. Benedict argues the cause for the claimants.
Mr. E. C. Benedict argues same side.
Mr. Kirkland argues for the libellants.
Cur. adv. vult.

At a stated term of the district court of the United States of America for the southern district of New York, held at the City Hall, in the city of New York, on Saturday, the sixteenth day of

December, in the year of our Lord one thousand eight hundred and fifty-four.

182 Present, the Honorable Samuel R. Betts, district judge.

HENRY FITZHUGH
vs.
THE STEAMBOAT COMMERCE, her tackle, &c. } 10. 221.

This case having been heard on the pleadings and proofs, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged and decreed, by the court, that the libel filed in this cause be dis-

183 missed with costs, to be taxed against the libellant.

Endorsed: Vol. 10. No. 221. United States District Court for the Southern district of New York. Henry Fitzhugh et al. vs. The Steamboat Commerce, her tackle, &c. Benedict, Scoville & Benedict, proctors for cl'mts.

Final decree dismissing libel.

184 Filed the sixteenth day of December, 1854.

District Court of the United States for the Southern district of New York.—In Admiralty.

HENRY FITZHUGH, DEWITT C. LITTLEJOHN and James Peck
vs.
THE STEAM PROPELLER COMMERCE, &c.

Sir: Take notice that the libellants intend to appeal

185 from the final decree of the court in this cause.

Yours, &c.,

LUCIEN BIRDSEYE,
Proctor for Libellants.

Dated New York, Dec. 23, 1854.

To the CLERK and C. L. BENEDICT, Esq.,
Proctor for the Respondents,
The Commercial Transportation Company.

Endorsed: 10. 223. U. S. D. C. S. D. of N. Y.—In admiralty. Henry Fitzhugh et al. vs. The Commerce. Notice of intention to appeal.

LUCIEN BIRDSEYE,
Proc. for Lib'lts.

To the CLERK.

186 Filed Dec. 26, 1854.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Ralph H. Stetson, of the city of New York, clerk, being duly sworn, says, that on the 26th day of December, 1854, he served a copy of the annexed appeal on C. L. Benedict, Esq., the proctor of the appellees, by delivering the same to him personally.

R. H. STETSON.

Sworn before me, this 26th day of December, 1854.

187 R. E. STILWELL,
U. S. Com'r.

In the Circuit Court of the United States for the second circuit and the Southern district of N. York.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN and James Peck, Appellants,
vs.
THE STEAM PROPELLER COMMERCE, her tackle, &c., and the Commercial Transportation Company, Claimants and Respondents.

188

To the honorable the Circuit Court of the United States for the second circuit and the Southern district of New York:

The appeal of the above named appellants respectfully showeth, that on the twenty-seventh day of August, in the year one thousand eight hundred and fifty-two, they, the said appellants, exhibited their libel in the district court of the United States, for the southern district of New York, against the steam propeller Commerce, her engine, boilers, tackle, apparel, and furniture; that in and by said libel it is alleged, among other things, that on
189 the evening of the 20th day of August, A. D. 1852, a certain boat called the Isabella, of Norton's Landing, which was owned by the said appellants, and was freighted by them with merchandise, while the same was on a voyage from the port and city of New York to the port and city of Albany, and was being towed in a tow with other boats and barges by the steam
190 tow-boat called the Indiana, upon the waters of the Hudson river, was run into and afoul of by the said steam propeller the Commerce, and was thereby so broken and injured that said boat Isabella, with all her cargo, was then and there forthwith sunk in the channel of said river, and that the said libellants had thereby suffered damages to the amount of seventeen thousand dollars and upwards, and the libellants thereby pray that the said vessel or propeller the Commerce, her engine, boilers, tackle, apparel, and furniture, may be condemned and sold to pay the
191 said damages and costs.

That process against said vessel issued out of said court on said libel, and the said vessel or propeller was arrested thereupon; that subsequently, and upon the first day of September, one thousand eight hundred and fifty-two, the Commercial Transportation Company filed their claim, by which they claimed to be the owners of the said propeller, and on or about the twenty-ninth day of October, one thousand eight hundred and fifty-two, put in their answer to said libel, and that the libellants replied to said
192 answer.

That the said cause came on to be heard before the Honorable Samuel R. Betts, judge of said district court, on or about the 21st, 22d, 23d, and 24th days of February, and on the 13th day of October, A. D. 1854, upon depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties, and that the said judge having advised thereon, on the sixteenth day of December, A. D. 1854, made a decree in
193 said cause, whereby it was decreed that the said libel be dismissed with costs, to be taxed against the libellants, as by reference to said decree may more fully appear.

And these appellants are advised and insist, that the said decree is erroneous, inasmuch as the libellants were entitled to a decree for the satisfaction of their said damages and costs, and the said respondents were not entitled to any decree or award in their favor.

These appellants for these and other reasons therefore
194 appeal from the whole of the said decree, of December 16th, 1854, to the next circuit to be held in the said district, and on the said appeal they intend to have the said cause heard anew in the said circuit court on the pleadings and proofs in the district court, and on other proofs to be introduced in said circuit court, and they pray that the said decree of the 16th of December, A. D. 1854, and every part thereof, may be reversed with costs, or such other decree made in favor of the appellants as to said circuit court may seem just, and that the said respondents may be
195 condemned to pay the appellants' costs and damages in the premises.

Dated December 23d, 1854.

LUCIEN BIRDSEYE,
Proctor for Appellants.
CH. P. KIRKLAND,
Advocate.

Endorsed: 10. 223. U. S. Circuit Court, 2d circuit, and S. D. of New York. Henry Fitzhugh and al. vs. The Commerce. Petition of appeal and proof of service upon the proctor for the claimants. Lucien Birdseye, pro. for appellants.

Filed Dec. 26, 1854.

Bond for Costs on Appeal.

District of the United of States of America, for the Southern district of New York, in the second circuit.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and James Peck, Libellants
196 and Appellants.
vs.
THE STEAM PROPELLER COMMERCE, her tackle, &c., Claimants and Appellees.
} Bond for Costs.

Know all men by these presents, that we, Robert F. Sage, of the city of Brooklyn, in the county of Kings, and State of New York, commission merchant, and William G. Lord, are held and firmly bound unto the above named appellees in the sum of five hundred dollars, to be paid to the said appellees, for the payment of
197 which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the second day of January, in the year of our Lord one thousand eight hundred and fifty-five.

Whereas the above named libellants have prosecuted an appeal to the circuit court of the United States, for the southern district of New York, second circuit, to reverse the decree rendered in
198 the above entitled suit by the judge of the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ROB'T F. SAGE, [L. S.]
WILLIAM G. LORD. [L. S.]

Sealed and delivered, and taken and acknowledged, this
199 2d day of January, 1855, before me.

GEO. W. MORTON,
U. S. Comm'r.

UNITED STATES OF AMERICA,
Southern District of New York, ss.

Robert F. Sage and William G. Lord, being duly sworn, do depose and say, and each for himself says, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

ROB'T F. SAGE,
WILLIAM G. LORD.

Sworn to this second day of January, A. D. 1855, before
200 me.

GEO. W. MORTON, *U. S. Com'r.*

201 Filed this 2 day of January, 1855.

At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Friday, the eighth day of May, in the year of our Lord one thousand eight hundred and fifty-seven.

Present, the Honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

HENRY FITZHUGH
v.
THE PROPELLER COMMERCE, &c.

The appeal in this case coming on to be heard, Mr. Grant reads from the apostles the evidence on the part of the libellant and deposition of Lewis Ensign. Mr. Benedict reads on part of resp'ts.

Mr. Grant is heard on part of liblnts. and appellants.

Mr. Benedict is heard on part of respondents and appellees.

Mr. Grant is heard in reply.

Cur. adv. vult.

Circuit Court of the United States, for the Southern district of New York.

HENRY FITZHUGH and als., Liblnts. and Appellants,
v.
THE PROPELLER COMMERCE and Commercial Transportation Co., Clmts. and Appellees.
} Notice.

Please to take notice, that Lewis Ensign and Mathew Shoonmaker will be examined (de bene esse) on the part of the appellants in the above entitled cause, before me, (a commissioner duly appointed by the circuit court of the United States for the southern district of New York, under and by virtue of the acts of Congress in such case made and provided,) at my office, 9 College Place, in the city of New York, on the 12 day of Nov., at 10 o'clock in the forenoon of that day, at which time and place you are hereby notified to be present, and put interrogatories, if you shall think fit.

Dated New York, the tenth day of Nov'r, A. D. 1856.

Yours, &c.,
R. E. STILWELL,
United States Commissioner, duly appointed by the Circuit Court of the United States, for the southern district of New York, in the second circuit.

To C. L. BENEDICT, Esq.,
Pro. for Clmt. and Appellees.

SOUTHERN DISTRICT OF NEW YORK, ss.
City and County of New York, ss.

Abraham P. Grant, being sworn, says that he, this deponent, on the 11th day of November, instant, at about fifteen minutes past ten o'clock in the forenoon, served copy of the within notice on C. L. Benedict, esq., the proctor of the claimant, by delivering to and leaving with said Benedict said copy of said notice, in his law office, in said city of New York; that E. C. Benedict, esq., one of said firm of Benedicts, and a partner of Charles. L. Benedict, esq., was present in said law office within a moment or two after deponent served such notice, and in a few moments thereafter, and before 11 o'c'k a. m., deponent saw said notice lying upon a table occupied in said office by E. C. Benedict, esq.

A. P. GRANT.

Sworn and subscribed, this 12 day of Nov., 1856, before me.

R. E. STILWELL,
U. S. Com'r.

United States of America.

SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss.

Be it remembered, that on this twelfth day of November, in the year of our Lord one thousand eight hundred and fifty-six, I, R. E. Stilwell, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, United States Court Buildings, No. 41 Chamber street, in the city of New York, in the said southern district of New York, in the State aforesaid, Lewis Ensign, to testify and the truth to say, on the part and behalf of the libellants, in a certain suit or matter of controversy, now depending and undetermined, in the circuit court of the United States for the southern district of New York, wherein Henry Fitzhugh and others are liblnts. and appellants, and the propeller Commerce and Commercial Transportation Company are claimants and appellees.

And the said Lewis Ensign, being about the age of years, and having been by me first cautioned and sworn to testify the

truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Lewis Ensign, and he did thereupon depose, testify, and say as follows, viz:

Q. 1. Where do you reside, and what is your name, age, and occupation?

A. I now reside in the city of New York; age 46 years, and am a pilot by profession.

Q. 2. How long have you been engaged on the Hudson river as a pilot, and on what kind of vessels have you been engaged?

A. Since 1829, from 1829 to 1835, I was in Albany sloops. The balance of the time I have been piloting steamboats on the Hudson river.

Q. 3. Have you been engaged in the seafaring business on any other waters than the Hudson river? If so, on what vessels; on what water; how long, and in what capacity?

A. I have been engaged on other waters than the Hudson river; I was engaged on the steamship United States, plying between New York and Chagres, on the Atlantic; I made two voyages, and absent about two months; I acted sometimes as pilot, and sometimes as sailing-master.

Q. 4. On what vessel have you been engaged this season, and in what capacity?

A. I have been on the steamers "Deer" and "Glen Cove," and was a pilot on each, and am still engaged on the "Glen Cove."

Q. 5. On what vessel were you engaged in 1852; how long were then engaged, and what was your position?

A. On the steamer Oregon; I can't say how long I was on her, but was employed on her through the months of August and September, as first pilot.

Q. 6. Who was the second pilot on the Oregon in 1852?

A. Alexander Wilson.

Q. 7. Did you know of a collision in August, 1852, between the propeller Commerce and the canal-boat Isabella, on the Hudson river?

A. I know of a collision occurring at that time, but did not know the names of the colliding vessels.

Q. 8. Did you afterwards *leave* the names of these vessels; and if so, what were they?

A. The propeller's name was "Commerce," I think, and the other was the canal-boat Isabella.

Q. 9. What steamer had the canal-boat in tow, and which way was she bound?

A. The Indiana; she was bound up the river.

Q. 10. When did you leave Albany on that trip, and which way was you bound?

A. I left, I think, between six and seven o'clock in the evening, and was bound to New York, and made about nine miles the hour.

Q. 11. Was the "Oregon" a passenger boat? How much water did she draw, and was she light or loaded?

A. She was. She was drawing that night about seven foot and a half; I should think she had on a light freight, and quite a number of passengers.

Q. 12. About how many miles below Albany did the collision occur, and about how far from "nine-mile tree?"

A. About ten miles below Albany, and about a mile below "nine-mile tree."

Q. 13. What were your regulations respecting the watch on deck; whose watch was it, and who were on duty at the time of collision?

A. The crew was divided; there was one-half on duty at a time. The first pilot took the watch from Albany till the boat reached Newburgh, and from Newburgh the second pilot took the watch to New York; I was on duty, one wheelsman, and one deck hand.

Q. 14. Was the second pilot, Alexander Wilson, on deck at this time, or had he turned in; if on deck, had he any charge over the vessel, or any duties to perform during the first pilot's watch?

A. I think he was on deck. He had no charge or duties to perform unless called upon by the first pilot.

Q. 15. Where did you first come up to the propeller; how near to her did you run, and what did you do?

A. A short distance above Mull's island we run within a length and a half of the boat, and I rung the bell to stop the engine, and did so.

Q. 16. Why did you stop the engine?

A. In consequence of a schooner being ahead of the propeller; I was afraid, if I attempted to pass, I might come in contact with some other vessel.

Q. 17. Did you see the steamer Indiana or the light before the propeller passed her; if yea, about how far off from her was you when you first saw her light, and did she indicate in any manner that she had vessels in tow?

A. I saw the lights of the steamer about a mile or more off. Before I got to her, I saw, by her lights and her movement, that she had vessels in tow.

Q. 18. Had the propeller's crew as good an opportunity for seeing her light as you had?

A. They had.

Q. 19. Did you see the propeller when she passed the Indiana; if yea, on which side of her, and about how far off did she pass?

A. I did; she passed on the west side, and I should judge she was 60 or 70 feet off.

Q. 20. About how far was you then in the rear of the propeller?

A. I think about 600 feet.

Q. 21. Was there a sail vessel between the propeller and Indiana when they passed; if yea, which way was she sailing, and what was the situation of her sails and her boom?

A. There was a schooner bound up, and under her mainsail and foresail, and her main boom was out.

Q. 22. What kind of a night was it, and what was the force and direction of the wind?

A. I think the night was somewhat cloudy, but am not positive. The wind was blowing southeast, and a middling good breeze.

Q. 23. Did the Oregon stop altogether when you rung the bell?

A. The engine stopped, but the boat continued her way through the water at reduced speed.

Q. 24. After you stopped your engine, how did the speed of the Oregon compare with that of the propeller?

A. I don't think we gained upon her until I put the engine in operation again.

Q. 25. When, on which side, and how did you pass the propeller?

A. We passed her on the west side, after the schooner had gone out of my way; I passed her by putting my engine in operation.

Q. 26. About how many feet does the water rise at that place at high tide; and was it then high or low tide?

A. The rise and fall is about four feet. It was somewhere near high water.

Q. 27. Are you acquainted with the river at, above and below the place of collision, and with the course and depth of its channel?

A. Yes, sir.

Q. 28. After the propeller passed the Indiana did she change her course? If yea, state how much and how she changed it.

A. Yes, she changed her course and put off about two points to the eastward.

Q. 29. Was you looking at her when she made this change?

A. I was.

Q. 30. Did you then see the last tow of the Indiana, and what did you suppose would be the result of this change of the propeller's course?

A. I saw the last tow; I supposed the propeller would run into the last tow; I made the remark to my wheelsman that the propeller would run afoul of the steam tow.

Q. 31. Did the propeller continue on the course to which she had been changed until she struck the Isabella?

A. I couldn't perceive any alteration in her.

Q. 32. Did you hear her bells; if so, at about what time?

A. I did hear bells, and it was about a few moments before I heard the crash of the collision.

Q. 33. Was she under full headway when she struck the propeller?

A. I don't know whether she was or not.

Q. 34. How many hawser tows had the Indiana?

A. Two, I think.

Q. 35. Was the Isabella in the last hawser tow?

A. She was.

Q. 36. Did this last tow change its course from the time the propeller passed the Indiana until the collision?

A. Not that I could perceive

Q. 37. What side of the channel of the river was the Isabella at the time of the collision?

A. I think she was a little to the eastward of the centre.

Q. 38. About how far was you in the rear of the propeller at the time of the collision?

A. It, in my judgment, must have been about 400 feet.

Q. 39. How many and what bells did you ring at the time you stopped the engine, when the propeller was about passing the Indiana?

A. First I rang the slow bell, then the bell to stop.

Q. 40. Whose duty was it to ring the bell at that time?

A. It was mine, I being on watch.

Q. 41. At the time the propeller passed the Indiana, on which side of the channel was the Indiana and her tow?

A. On the east side of the centre of the channel.

Q. 42. Were both of the steam hawser tows on the east side of the centre of the channel and in line with the Indiana when the propeller passed her?

Q. 43. What was your opportunity for seeing these different boats, from the time you stopped your engine, till the collision?

A. It was good to see all except the steam-tow, and that was so far off that I could not see it distinctly until I got near it.

Q. 44. When did you put your engine in operation and pass the propeller?

A. About the time of the collision.

Q. 45. On which side of her did you pass, and about how far distant from her?

A. We passed on the west side of her and about one hundred feet from her.

Q. 46. Could you have gone further west than you did on passing her, without going aground or ashore; if so, about how much further west?

A. I think I could about two feet further.

Q. 47. Until you passed her, had the Oregon been down to or lapped the propeller's stern on either side?

A. I think not.

Q. 48. Had the Oregon attempted to pass the propeller on either side and failed?

A. I don't think she had.

Q. 49. Suppose the propeller after passing the Indiana had not changed her course, and had kept directly down the river, could the collision have occurred?

A. I think it could not.

Q. 50. Was there any obstruction or difficulty in the way of her passing the Isabella to the west, on that course, as the respective vessels were then situated?

A. Nothing that I could see.

Q. 51. Was there sufficient room and depth of water to enable the propeller to pass the Isabella on the west side without going aground or ashore?

A. There was.

Q. 52. Suppose a canal-boat is lashed to a barge on her larboard side, and the barge was the steamer Hawser, which boat does the steering?

A. The barge.

Q. 53. Under such circumstances, would it, in your judgment, be proper to lash the helm of the canal-boat half a-port and let the barge do the steering?

A. I should think it would.

Q. 54. From your knowledge of the Hudson river, and from an examination of a map now shown you, marked A, R. E. Stilwell, U. S. court, is it a correct map of so much of the river as is laid down thereon?

A. I think it is a correct map.

L. ENSIGN.

Sworn to before me, this 12th Nov'r, 1856.

R. E. STILWELL,
U. S. Com'r.

UNITED STATES OF AMERICA,
Southern District of New York, ss.

I, R. E. Stilwell, a commissioner duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named, and that the testimony is taken under the rule of the Supreme Court of the United States.

I further certify, that a notification of the time and place of taking the said deposition signed by me was made out and served on the adverse party, to be present at the taking of the said deposition, and to put interrogatories, if he or they might think fit.

I further certify, that on the twelfth day of November, in the year of our Lord one thousand eight hundred and fifty-six, I was attended by A. P. Grant, esq., on part of appellants, and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness, and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of filing the same with my own hand in the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof, I have hereunto set my hand and seal, this thirteenth day of Nov'r, in the year of our Lord one thousand eight hundred and fifty-six, and of the independence of the United States the eighty-first.

R. E. STILWELL,
United States Commissioner, duly appointed by the Circuit Court of the United States, for the sourthern district of New York, in the second circuit.

At a special term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on the 18th day of September, in the year of our Lord one thousand eight hundred and fifty-seven.

Present, the Honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and James Peck, Lib'lnts and App'lnts,
vs.
THE PROPELLER COMMERCE, the Commercial Transportation Co., Cl'mts and Appellees.

This cause having been brought to a hearing on the appeal therein from the decree of the district court of the United States for the southern district of New York, dismissing the libel with costs, and being argued by A. P. Grant, esq., of counsel for the appellants,

and E. C. Benedict, esq., of counsel for the appellees, and due deliberation had, it is ordered, adjudged, and decreed that the decree of the court below be and the same is in all respects reversed with costs, and that it be referred to K. G. White, U. S. commissioner, to ascertain and report the amount due and payable to the libellants herein.

And it is further ordered, adjudged, and decreed, that on the coming in and confirmation of the said commissioner's report, a final decree be entered in favor of the libellants for the amount which may be reported with their costs.

S. P.

Endorsed: U. S. circuit court, southern district of New York. On appeal. Henry Fitzhugh and others, appellants, vs. The Propeller Commerce, appellees. Decree. A. P. Grant, proctor, Oswego.

Filed Sept. 18, 1857.

Circuit Court of the United States for the Southern district of New York.

HENRY FITZHUGH et al.
vs.
THE PROPELLER COMMERCE, The Commercial Transportation Co., Claimants.

Reference, under order of court, dated September 18th, 1858.

November 17, 1857.—Present, Mr. Grant, counsel for libellants; Mr. Benedict, counsel for claimants.

William J. Campbell sworn on part of libellants: Was in the employ of libellants, in the city of New York, in August, 1852; I acted as tallyman, and tallied on board the canal-boat Isabella a cargo on the 19th Aug., 1852; I have in my possession the tally-book I used on that occasion; the canal-boat was bound from New York to Oswego; she was towed up the river to Albany; this was the usual way of taking up canal-boats; do not remember the name of vessel that towed her.

Q. Will you state what goods, merchandise, and property were put on board the canal-boat Isabella, in the city of New York, on the 19th Aug., 1852, and tallied on board said boat by you?

Question objected to as irrelevant.

Objection overruled and exception taken.

A. No. 1. Property consigned to J. B. Colwell, 32 kegs of lead of two sizes, 50 lb. kegs and 25 lb. kegs, 16 of each, marked "J. B. C."

No. 2. Property consigned to W. J. Gordon, Cleveland, Ohio, marked W. J. G., Cleveland, 7 barrels sugar, 1,778 lbs.

No. 3. Property consigned to George Worthington & Co., one cask hardware, marked Geo. Worthington, Cleveland.

No. 4. Property consigned to E. Theising & Evans, 2 boxes, 1 band, marked E. Theising & Evans, Cincinnati.

No. 5. Property consigned to Smith, Drury & Co., care of B. Pendleton & Co., Troy, Ohio; Smith, Drury & Co., are of Troy, Ohio, and Pendleton of Toledo.

No. 6. Property consigned to John Luther, 1 box, marked John Luther, Cincinnati.

No. 7. Property consigned to Colwell, Spurring & Co., 5 boxes, 1 barrel, marked C. & H., Cleveland.

No. 8. Property consigned to Hanna, Garretson & Co., 1 box, marked Hanna, Garretson & Co., Cleveland; 61 bags coffee, marked H., G. & Co., Cleveland.

No. 10. Property consigned to A. & S. Nordheimer & Co., 2 piano fortes, marked [N], Toronto, Canada West.

No. 11. Property consigned to J. C. Rutledge, 2 bales candlewick, 3 boxes starch, 4 boxes spice, 3 boxes soap, 1 box chocolate, 8 boxes pipes, 1 box catsup, 2 pepper sauce, 1 soap, 2 boxes candles, 1 box sundries, 2 bbls. fish, 2 tierces cod, 2 casks, (weighing 600, 585 lbs. respectively, as marked,) 6 bbls. fish, 2 bbls. oil, 1 box tobacco, 1 cask, (weighing 380, as marked,) 2 boxes, (15 lbs.,) 1 bag sundries, (10 lbs.,) all marked J. C. Rutledge, care of Haskall, Toledo.

No. 12. Consigned to Kendall, King & Halliday, 9 bales, 1 bale 175 lbs., 1 bale 165 lbs., 1 bale 285, 1 bale 280, 1 150, 1 100, 1 100, 1 100, 1 300, marked K. K. & H. Lima, care Field & King.

No. 13. Consigned to H. W. Brown, 1 box, 3 bales bats, 1 bale yarn, 2 bales warp, 2 bales sheeting, 1 bale bags, 1 cask currants, 6 dry kegs, (weighing in the aggregate 417 lbs.,) 1 keg snuff, 2 bbls. oil, 1 case (40 lbs), marked H. W. Brown, Medina, care Handy & Walkin, Cleveland.

No. 14. Consigned to Kreuzburgh & Nune, 2 boxes marked Kreuzburgh & Nune, Cincinnati.

No. 15. Consigned to W. & H. Maybury, 2 boxes marked W. & H. Maybury, Jeffersonville, Indiana.

No. 16. Consigned to T. S. Clarkson, 1 box furniture marked T. S. Clarkson, Potsdam, care of Allen, Ogdensburgh.

No. 17. Consigned to J. F. Clark, 1 box, 3 kegs tin, (680 lbs.) marked James F. Clark, Cleveland.

No. 18. Consigned to Great Western Railroad Co., 1 engine and 18 pieces castings, 3 boxes, 1 wheel, 2 boxes, 1 pillow block, marked Great Western R. R. Company, Hamilton.

No. 19. Consigned to Brooks & Denman, 2 casks, marked Brooks & Denman, Battle creek.

No. 20. Consigned to Taylor & Laswell, 5 bags coffee, 1 box sugar, 20 bags coffee, 2 bbls. madder, 1 keg alum, 1 box logwood,

6 boxes tobacco, 1 keg ginger, 1 keg indigo, marked Taylor & L., Lewellenville, care of railroad agent, Sandusky.

No. 21. Consigned to J. G. Garden, 4 chests tea, marked J. G. G. T.

No. 22. Consigned to A. Weaver, 24 bundles iron, marked A. Weaver, Mr. Washington, Cur Pinte, 8, city.

No. 23. Consigned to G. Munroe & E. Perry, 10 hds. sugar, marked G. M. T., 8 hhds. sugar, marked E. P. & Co. C.

No. 24. Consigned to Bain & Williams, 2 boxes raisins, 1 box pipes, 3 boxes tobacco, 1 box spice, 1 box logwood, 2 bbls. molasses, marked Bain & W. Marion.

No. 26. Consigned to Ontario and St. Lawrence Steamboat Company, 3 boxes candles, marked Oswego and St. Lawrence Steamboat Company.

No. 27. Consigned to W. C. Mason, 1 package books, marked Rev. W. C. Mason, care E. B. Allen & Sons, Ogdensburgh.

No. 30. Consigned to B. W. Booth, weight 510 lbs., 1 bbl., marked R. W. Booth, Cincinnati.

No. 31. Consigned to J. E. Davies, 1 hhd. sugar, marked J. E. Divids, Marion, care railroad agent, Sandusky city.

No. 32. Consigned to Newell & Wilson, 84 demijohns, 3 bags nuts, marked N. & N., Maysville, Kentucky.

Cross-examined.

I continued in the employ of the old Oswego Line till the 1st or 10th of January of the next year; I saw all the articles I have mentioned above, go on board; I have not much recollection of them, except from my book; several of those barges were loading every day; she took all her load in one day, I believe, at pier 5, East river; I think I was absent once while she was loading; was there all the time, except when one article was put on; never saw these articles again; don't know what became of them; this is my tally-book, in my handwriting, from which I have read the goods and their marks as above.

WILLIAM J. CAMPBELL.

Sworn to before me, this 17th day of November, 1857.

KENNETH G. WHITE,
U. S. Com'r.

Frederick S. Littlejohn, sworn on part of libellants.

I reside in Brooklyn; was in employment of libellants in 1852; I was their agent in managing the forwarding business; my office at 100 Broad st., New York; in 1853 or 1854 Peck went out, and the business was conducted by Fitzhugh & Littlejohn since 1852; I have continued in employ of libellants till they dissolved,

and since that, of Fitzhugh & Littlejohn. I paid some of the bills of goods which were lost on board the Isabella—that is, I paid the drafts and notes of Fitzhugh & Littlejohn given for these goods, and some bills I settled myself and paid in cash.

Q. Did you pay for the libellants to William J. Gordon any money, and if so, how much, for any goods lost on board the canal-boat Isabella in August, 1852?

Objected to, and objection overruled. Exception taken.

A. I did. I paid H. Fitzhugh & Co.'s draft of Oct. 2d, 1852, at one day, for $101 94. It was drawn on me in favor of Wm. J. Gordon.

I paid H. Fitzhugh & Co.'s draft on me, in favor of George Worthington, Oct. 7, 1852, at 10 days, for $246 53.

I paid, Feb'y 21st, 1853, H. Fitzhugh & Co.'s note, Aug. 18, at 6 months, payable at Hanover Bank, for $65 59, to Russell & Irwin Mftg. Company, for amount of bill of E. Theising & Evans, or their order. A receipt was given by the Russell & Irwin Mftg. Co., to whom E. Theising & Evans had given an order for that payment.

I paid H. Fitzhugh & Co.'s note, given to Babcock & Co., for 38 bags of coffee, Smith, Drury & Co., note dated Aug. 19, 1852, at 4 months, for $556 25. It was for goods which Smith, Drury & Co. had purchased of Babcock, but not paid for. I paid the note Dec'r 22, 1852.

I paid, February 20, 1853, H. Fitzhugh & Co.'s note, given to Barten Brother, New York, Aug. 18th, at six months, for $481 02, for bill of goods of John Luther.

I paid, Oct. 22d, 1852, H. Fitzhugh & Co.'s draft on me to the order Colwell, Spurring & Co., I think for $507 59, for goods marked "G. & H., Cleveland."

I paid, November 21st, 1852, H. Fitzhugh & Co.'s draft on me, given Hanna, Garrettson & Co., dated Oct. 19, at 30 days, for $913 08.

I paid, Nov. 5th, 1852, in cash, probably to John B. Durhams, for two piano fortes, sold A. & S. Nordheimer, Toronto, $360.

I paid, Nov. 21st, 1852, H. Fitzhugh & Co.'s draft on me, dated Nov'r 6, at one day, for $481 48, for bill of sheeting of Kendall, Keney & Halliday and Austin & Smith.

I paid, Nov'r 24th, 1852, H. Fitzhugh & Co.'s draft on me, dated Nov'r 6th, at one day, for bill of lost goods of H. W. Brown, $435 87.

I paid, Dec'r 2, 1852, H. Fitzhugh & Co.'s draft on me, dated Nov'r 6th, at one day, for goods lost of Kreuzburgh & Nune, for $200 45.

Adj. to the 18th, at 11 a. m.

November 18, 1857. Present, the counsel for respective parties.

I paid, Nov. 6th, 1852, at my office, to Walsh, Malloy & Co., $46 74, for goods lost, W. & H. Mabury.

I paid, Oct. 18, 1852, at my office, $14 75, to a clerk, for Goodhue & Co., goods lost of T. S. Clarkson.

I paid, Oct. 18, 1852, $38 00. I paid so much, and I think to Mr. Clark himself, for box of furniture.

I paid, Dec'r 7, to Phelps, Dodge & Co., $156 94, for a loss of 3 kegs of bar tin, marked James F. Clark, Cleveland.

I paid, Feb'y 17, 1853, H. Fitzhugh & Co.'s note, dated Aug. 14th, at 6 months, made payable at Hanover Bank, $264 98, goods lost, Brooks & Denman.

I received a receipt from Wolfe & Bishop, which is on the voucher marked 19.

I paid, Dec. 22, 1852, H. Fitzhugh & Co.'s note, dated Aug. 19th, at four months, order of Babcock & Co., $454 70, goods lost, marked Taylor & Salen. I paid to same party, Mch. 19th, 1853, to Babcock & Co., $71 75, for damages on tobacco, and took a receipt, which is endorsed on voucher marked 20.

I paid, Sept. 22, 1852, to E. D. Morgan & Co., $82 47, for goods lost, marked J. G. Gordon.

I paid, Dec. 6th, 1852, to G. T. Cobb & Co., $44 25, for goods lost, marked A. Weaver.

I paid, Dec 22, 1852, Wood & Grant, $1,398 09, for sugar lost, 10 hhds., marked $\frac{G.\ M.}{T.,}$ for George Monroe, Toronto, and for 8 hhds. sugar, marked $\frac{E.\ P.}{C.,}$ for E. Perry & Co., Coburg.

I paid, Dec. 24, 1852, McBride, Sheldon & Co., $97 25, for goods lost, damaged, marked Bain & Williams.

I paid, January 15th, 1853, to Litchfield & Co., $23 77, for lost candles, marked Ontario & St. Lawrence Steamboat Co.

I paid, Dec. 10, 1852, to Carlton & Phillips, $45, for books lost, marked W. C. Mason, and, I think, at Ogdensburgh.

Counsel for libellant offers in evidence "Exhibit A," and offers to prove by witness that he paid the several items charged in that exhibit.

Offer rejected. *Excepted* taken. Counsel for lib'lnts offers to show by this witness that he procured a certified copy of a map of the Hudson river, from the Coast Survey office at Washington, for which he paid $12.

Offer rejected. Exception taken. All the payments which I made, and heretofore testified to by me, were for goods which were lost or damaged on board the Isabella at the time of the collision on the Hudson river, on the 19th August, 1852.

Cross-examined by Counsel for Claimants.

I saw the cargo in a damaged state at Albany, after it left N.

Y., at No. 96, on the pier. We employed a loft there for the purpose of saving as much of it as we could; that, I think, was No. 80 on the pier. Don't know of my own knowledge how the boat was raised; she was raised and carried with a portion of the cargo to Albany. Did not see any part of cargo in boat; it was taken out by L. S. Littlejohn, Albany. A portion of her cargo was sent forward, which was not so seriously injured as to render it unmerchantable, in our judgment, to the persons to whom it was addressed. The rest of it, which came to Albany, was placed in a warehouse and sold at public auction—that was not worthless. Don't remember the amount of the proceeds of that sale; about $1,000. Did not attend the sale; and that money was received by L. S. Littlejohn, who did attend the sales; he is now dead. Do not know where the account sales is; nor do I know the auctioneer. I think there were a few articles sold at private sale, that I bought myself; it was a chair; paid $5 for it, to L. S. Littlejohn. I think there were a few other articles sold at private sale; can't tell what was sold at auction; can't tell what was rejected as worthless. Can't tell to my own knowledge the amount of damage to any of this cargo. I do know that the sugar was entirely destroyed—that is, none of it was on deck when the boat arrived at Albany. The boat arrived at Albany 3, 4 or 5 days, I don't know but a week, after the accident; didn't see her when she arrived. I do not positively know, but think there was $2,000 insurance on this cargo in favor of the libellants, on general cargo. There are insurance companies who affected insurance for individuals on parts of this cargo, who have paid the same to the parties insured, and who now make claim against the libellants for the same. I do not know whether the libellants received from the underwriters any part of the $2,000 insured. My books will show, if I received it. My books will not show proceeds of the auction sales. Books of L. S. Littlejohn will show. My impressions are, that a portion of the coffee was kiln-dried and roasted and sent to Cincinnati, by the libellants or their agent. I don't know the fact, but have seen such a credit among the papers. It was dried in Albany, I suppose.

Counsel for claimant objects to the proof of insurance effected by libellants on this cargo, and the proof is taken subject to this objection.

Counsel claimant objected to the evidence of Mr. Littlejohn, of payments made by him, and the same were taken subject to objection. Question for each payment specifically not being repeated, by consent of parties.

I made the negotiation for the settlement of the greater part of the claims paid by me. I negotiated the settlement of the amount of damages paid on voucher, Nos. 4, 5, 6, 10, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27. Don't know, of my own knowledge, how

the amount of the others was arrived at, except by these papers. The pianos in No. 10 were brought back to N. Y., and sent to the manufacturer, Mr. Dunham. I had several interviews with him about damage, and to see if they could not be repaired; his answer was, that they were entirely worthless. He did allow $20 for them. Never saw them after I left them there. I *I* counselled with other dealers, and found that this man I could rely upon. I don't know what become of the articles in voucher No. 6; I presume they were sold at the auction at Albany. The hardware was opened, and wiped and repacked before going to the auction, to make it look as well as it could. A portion of the coffee in voucher No. 5, we had dried, and sold it; can't tell how much of it. All the coffee that came from the boat were mixed together in bulk, and dried and sold. The sugar in voucher No. 23 was on the deck; none of it ever reached Albany, to my knowledge. The Isabella was run over two or three times by other boats while lying in the river submerged. As to voucher No. 24, my memory is that the tobacco was forwarded to the consignee; that he rec'd at the valuation of $10 50, which was allowed upon his bill. Don't know myself of the amount of damage on the tobacco; I think there was an appraisement of the damage to that tobacco, or a letter was received, which satisfied me of the damage. Voucher No. 17 is the chair I bought for $5. The bar-tin in this voucher would not injure at all, in my judgment, in the water; I don't know what became of it. All the amounts that I have stated that I paid, were paid in good faith, without any deduction or abatement.

Direct resumed.

I couldn't tell where the bar-tin was placed. Some of these bills embrace damages in goods we sent forward.

Cross-examination resumed.

With regard to the bills of vouchers not settled by me as above stated, all I know is, that I was advised by Fitzhugh & Co. that such drafts and notes were to be entered in my bill-book, and paid at their respective dates by me, for losses and damage to goods marked to the different parties holding the notes and drafts to whom they had been given, for losses and damages to goods which were on the Isabella at the time she was sunk. At that time we seldom gave bills of lading for goods, but generally shipped on contract. Of my own knowledge, I know of but one bill of lading given in this cargo, but there might have been other. The bill of lading attached to voucher 14 is our usual form of bill of lading. Most of these goods were carried under season contracts made between the Old Oswego Line and the parties to whom the property was addressed. We do not generally keep these contracts more

than one or two years. He may have these, possibly, among some old papers. They are all in one form—blanks filled up.

F. S. LITTLEJOHN.

Sworn to before me, this 17 day of Nov'r, 1857.

KENNETH G. WHITE, *U. S. Comm'r.*

Voucher No. 1, for $11 12.
" No. 11, " 232 41.
" No. 18, " 132 53.
" No. 31, " 66 96.

It is admitted that these amounts were paid by libellants, for damages and goods that were lost on the Isabella.

Exhibits marked vouchers Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 31, are admitted as evidence of the goods therein specified, and the value of them, and that they were the goods put upon the Isabella, on the 19th day of August, 1852.

Adjourned. New notice to be given.

Oct. 2d, 1858. Counsel for both parties present.

Depositions of William C. Carter, Henry D. Smith and William J. Wheeler, introduced on part of libellants.

Adjourned to the 13 Oct., at 10 a. m.

October 13, 1858. Adjourned to the 27th of Oct.

Oct. 27th. Adjourned to the 28th of Oct.

Oct. 28th. Present, counsel for respective parties.

Frederick S. Littlejohn recalled on part of respondents.

Q. Look at this paper marked Exhibit "X," and say whether that is a copy of the blank contracts used by the "Old Oswego Line," in the year 1852, and under which the cargo of the Isabella was shipped, or most of it?

Objected to by counsel for appellants, on the ground that the claimants can have no interest in the contract, or the conditions of it, and if such a contract was made it could not be set up in this action.

Objection overruled and exception taken.

A. It is a blank used by the company in that year. It is the season contract referred to in my previous testimony, when goods were shipped by the line. They were either shipped under such a bill of lading, or under such a contract as I have referred to, or they were shipped without any bill of lading or contract; but in the latter case we considered our liability or exemption from liability the same as that in the bill of lading or written contract which was the universal usage of forwarding houses.

Cross-examined by Counsel for Appellants.

Q. What is the construction, under the general usage among forwarders, as to the liability of the parties, under such contract,

for goods damaged on the rivers of the State of New York, not connected with the lakes?

Objected to. Overruled and exception taken.

A. The phraseology embraced in that contract relating to exceptions by lakes and rivers were never meant to avoid the common carrier risk between New York and lake ports, but meant to cover the rivers connected with the lakes, such as St. Lawrence, Genessea, Niagara, Cuyahoga, Huron, Maumee, Raisin, Detroit, St. Clair and Milwaukee, and Chicago and Oswego.

F. S. LITTLEJOHN.

Sworn to before me, this 28th day of Oct., 1858.

KENNETH G. WHITE, *U. S. Com'r.*

Adjourned to the 29th of Oct., 1858.

Oct. 29, 1858. Present, counsel for respective parties.

Counsel for respondents offers in evidence Exhibit "W," which is admitted to be the contract under which the goods of George Worthington & Co. were shipped on board the "Isabella."

Counsel for appellants offers two contracts in evidence, marked Ex. "V" and "U," which are admitted to be the contracts under which the goods of W. J. Gordon and S. & J. H. Whittaker were shipped on board the "Isabella."

Last two exhibits taken subject to objection on part of counsel for respondents.

It is admitted by the parties that dilligent search has been made for the remainder of the original contracts, and that they cannot be found.

Exhibit marked Exhibit "U," introduced by counsel for respondents.

Circuit Court of the United States for the Southern district of N. Y.

HENRY FITZHUGH and others, Libl'nts and Appellants,
vs.
THE PROPELLER "COMMERCE," her boiler, tackle, &c., The Commercial Transportation Company, Cl'nts and Appellees.

NORTHERN DISTRICT OF NEW YORK,
Oswego County, ss.

De Witt C. Littlejohn, being sworn, says: that he is one of the libellants in the above entitled cause; this cause was commenced by a libel in the district court of the United States for the southern district of New York, in which a decree was entered against the libellants; thereupon an appeal was taken to the circuit court of the United States for said southern district of New York, and

said cause was argued and heard in said court in 1857, and a decree entered therein reversing the decree of the said district court, and decreeing and ordering that it be referred to R. G. White, esq., of the city of New York, to hear the proofs and ascertain the amount of damages to which the libellants and appellants were entitled under said last mentioned decree. Proof has been taken and several hearings have been had before said White, and the case is still pending before him.

This deponent further says, that William J. Wheeler, of Albany county, is a necessary and material witness for the above appellants, in this action, as this deponent is advised, by A. P. Grant, the proctor and counsel of said appellants, and that without the testimony of said Wheeler, the said appellants cannot safely close their proofs before said White. That said Wheeler lives on the west bank of the Mohawk river, about three miles above the village of Cohoes, in said county of Albany, and more than one hundred and fifty miles from the city of New York, where said White resides, before whom, and in said city, said case is to be tried and heard; that the Commercial Transportation Company is a company created by the laws of New Jersey, as deponent is informed and believes, and the persons comprising said Company, and owning the stock thereof, reside in New Jersey and Pennsylvania, as deponent is informed and believes, and that every stockholder in said Commercial Transportation Company resides more than one hundred and fifty miles from the city of Albany, where it is proposed and expected on the part of the appellants, that said Wheeler shall be examined, and his testimony therein taken; that C. L. Benedict, esq., is the proctor of the claimants herein, and that he resides in the city of New York, and keeps a law office there, which is more than one hundred miles from the city of Albany aforesaid.

DE WITT C. LITTLEJOHN.

Sworn before me this 18th day of Jan'y, A. D. 1858.

ALBERTUS PENRY,
U. S. Commissioner.

Affidavit of Wm. J. Wheeler, of Northumberland.

R. J. HUTTON, *U. S. Com'r.*

United States of America.

NORTHERN DISTRICT OF NEW YORK,
City and County Albany, ss.

Be it remembered, that on this 22d day of January, in the year of our Lord one thousand eight hundred and fifty-eight, I, Robert J. Hilton, a commissioner, duly appointed by the circuit court of the United States, for the northern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in

civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,' passed March 1st, 1817," and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, on the annexed aff't of De Witt C. Littlejohn, one of the lib'l'nts, appellants, that Wm J. Wheeler, of Watervliet, is a necessary and material witness for the appellants, and resides more than 100 miles from place of trial, did call and cause to be and personally appear before me, at my office, 74 State st., in the city of Albany, in the said northern district of New York, in the State aforesaid, William J. Wheeler, a resident of the town of Watervliet, in Albany Co., N. Y., to testify and the truth to say, on the part and behalf of the appellants, in a certain suit or matter of controversy, now depending and undetermined, in the circuit court of the United States for the southern district of New York, wherein Henry Fitzhugh, De Witt C. Littlejohn and James Peck, libellants and appellants, against the propeller Commerce, her boiler, tackle, &c., and the Commercial Transportation Company, claimants, appellees, and the said William J. Wheeler being about the age of 36 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said William J. Wheeler, and he did thereupon depose, testify, and say as follows, viz:

I am a resident of the town of Watervliet, in the county of Albany, N. Y., and my occupation is that of a boat-builder. I keep a yard in the said town of Watervliet, on the Erie canal, for the purpose of building and repairing canal-boats, and have been so engaged at said place for ten years last past. I know the canal-boat Isabella, which was reported to belong to the Old Oswego Line; she was sunk on the Hudson river, a few miles below Albany, in the month of August, A. D. 1852. I saw her at the first time at Greenbush, shortly after she was raised out of the run; I went to see the said canal-boat Isabella at the request of Col. L. S. Littlejohn, the then agent of the Old Oswego Line, at the city of Albany, who wished to have me repair said canal-boat. I made arrangements with him by which she was sent up by his man to my yard in Watervliet, and I there thoroughly repaired her, and I think the work was done on her in the months of September and October, A. D. 1852. Capt. Smith, the capt. of said canal boat, was there all the while, and had charge of and directed the repairs to said boat. The repairs were economically and substantially made, and no more of repairs were made than were actually necessary to put her in a good working condition, and the prices for the work and the materials furnished were as reasonable as could be afforded at the time it was done, and I think more reasonable

than it could have been done at any other place. The Exhibit A, which I now produce, is my own proper handwriting *in my own proper handwriting;* is the original bill of account of the work, materials, and repairs done and provided in repairing said canal-boat Isabella, and which was rendered to its owners, and by them paid, Oct. 29, 1852, and receipted by me at that time, as appears by said exhibit, and which Exhibit A is in all respects a just, correct, and true amount. The amount actually paid to me on that day (Oct. 29, 1852) in payment of said account, was the sum of eight hundred and eighty-five dollars and eighty-two cents, ($885 $\frac{82}{100}$;) at the time I first saw the said canal-boat Isabella at Greenbush, after the accident and after she had been raised, her bow-*stern* was entirely gone; her breast-hooks and hoods were badly broken, so that new ones had to be put in; the frame was wrecked in the forward quarter of the boat, so that we had to put in new futtocks, her deck; all her upper works were torn away clean to the deck. *Taffle earl* hatches, combings to the hatch and cabins, were entirely gone, and in some places the deck was so torn as to require new plank. Apparently vessels had passed over her while she remained sunk in the river, and some of the damage to her upper works had, I think, been occasioned in that way; she had to have an entire new bow, and a new stern, and when I first saw her she was kept afloat at the Greenbush dock by means of a canvass wrapped around her bow and puddling her with clay. When she arrived at my boat-yard there yet remained in her about a wagon-load of coffee, which was utterly ruined, and thrown out by my men and washed off. After her repairs had been completed, she went into the Old Oswego Line again. I understood at that *that* time that said canal-boat Isabella was owned by the above named appellants, for whom Col. L. S. Littlejohn was acting as agent. Col. Littlejohn paid my said bill for the repairs of the said boat, as agent of said appellant; and further says not.

WM. J. WHEELER.

Taken, sworn, and subscribed to before me, this 22d day of Jan'y, A. D. 1858, at city of Albany, N. Y.

R. J. HILTON,
U. S. Commissioner for Northern District of New York, 2d Circuit.

Exhibit A.—R. J. H., U. S. C.

Old Oswego Line, for Boat Isabella, to William J. Wheeler, Dr.

For dockage			$2 00
41$\frac{7}{8}$	days' labor, by foreman, 16 s		83 75
173	" " journeyman, 14 s		302 75
3,693	ft. R. M. oak lumber, 3 c		110 79
571	" chestnut, 3 c		17 13
1,088	" pine, 2 c		21 76

712 ft. R. M. pine, 3 c		$21 36
1,065 " pine, 3½ c		37 27
170 " beach, 2½ c		4 25
442 lbs. wro't spike, 9 c		39 78
212 lbs. cut " 7 c		14 84
197 lbs. " nails, 5 c		9 85
106 lbs. oakum, 9 c		9 54
100 lbs. pitch, 3 c		3 50
24 futtocks, 3 s		9 00
14 inches oak-knees, 2 s		3 50
Cash paid for matched stuff		8 89
" cotton		85
" trimmings for door, sash and lockers		6 39
" sash and doors		5 10
" lath nails		18
" cherry for tiller		63
" lead and copper		1 55
64¾ spike bolts, 9 c		5 83
47¾ bolts and nuts, 9 c		4 29
38 lbs. travellers and rings, 9 c		3 42
97½ lbs. band-iron, 9 c		8 78
27¾ lbs. small iron knees, 9 c		2 50
154 lbs. iron on bow-rails, 9 c		13 86
49 lbs. rivet-bolts, 9 c		4 41
461½ lbs. wale-irons, 9 c		41 53
126 lbs. " on stern, 9 c		11 34
130 lbs. stern wale-irons, 9 c		11 79
14 lbs. man-irons, 9 c		1 26
16 lbs. iron window-rods, 9 c		1 44
Wrought nails		1 25
Fitting irons on rudder-blade		1 06
Trimmings for windows		73
Iron on gang-plank		1 06
25 ft. white wood, 3 c		75
1¾ days' labor by foreman, 16 s. extra		3 50
3¼ " " journeyman, 14 s. extra		5 69
102 meals board by Capt. Smith, 1 s		12 75
Mr. Jackson, bill for painting		49 80
		901 20

CR.

By 175 lbs. old iron, 1½ c	2 63	
" 50 lbs. cut nails ret., 5 c	2 50	
		5 13
		$896 07

Deduct amt. of Capt. Smith's board	$12 75
	$883 32
Iron rods for boat	2 50
	$885 82

Albany, Oct. 29, 1852. Rec'd payment.

WM. J. WHEELER.

Cr., Nov. 5, '52.

Endorsed: In Circuit Court of U. States for Southern district of N. Y. Henry Fitzhugh and others, liblnts. and applnts. vs. The Propeller Commerce, her boiler, tackle, &c., the Commercial Transportation Company, clmts. and appellees.

I certify the foregoing account to be the Exhibit A, produced, sworn, and referred to in the annexed deposition of William J. Wheeler, a witness on the part of appellants.

Albany, Jan'y 22, '58.

R. J. HILTON,

U. S. Commissioner for Northern Dist. New York.

W. J. Wheeler.

883 32.

Voucher 9.

United States of America.

NORTHERN DISTRICT OF NEW YORK,
Albany County and City, ss.

I, Robert J. Hilton, a commissioner duly appointed by the circuit court of the United States, for the northern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed Feb'y 20, 1812, and the act of Congress entitled "An act in addition to an act entitled An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, passed March 1st, 1817," and the act entitled "An act to establish the judicial courts of the United States," passed Sept. 24, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness, Wm. J. Wheeler, resides in the town of Watervliet, in the county of Albany, and at a greater distance than one hundred miles from the place of trial.

I further certify, that no notification of the time and place of taking the said deposition signed by me was made out and served on the opposite party, or his attorney, to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit, because the said adverse party does not reside within one

hundred miles of the place of caption, nor has said adverse party any agent or attorney known to me within that distance.

I further certify, that on the 22d day of Jan'y, A. D. 1858, I was attended by Abraham P. Grant, the counsel for the appellants, and by the said witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by me reduced to writing in the presence of the witness, and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of transmitting the same by mail, with my own hand, to the court for which the same were taken.

And I do further certify I am not of counsel or attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand and seal, this 22d day of Jan'y, in the year of our Lord 1858, and of the independence of the United States the eighty-first.

R. J. HILTON,
U. S. Commissioner Circuit Court of the United States, for the northern district of New York, in the second circuit.

Witness fee, travel 26 m., and 1 day attending.....	$2 80
Court fees, taking deposition.....	3 50
Paid by appellants.....	$6 30

Endorsed: Circuit Court of United States for southern district of New York. Henry Fitzhugh and others, liblnts. and applnts., vs. the Propeller Commerce, her boiler, tackle, &c., the Commercial Transportation Company, claimants, appellees. Deposition of William J. Wheeler, of Watervliet, Albany Co., N. Y. A. P. Grant, proctor for appellants.

Opened in open court, and filed Sept. 16, 1858.

Circuit Court of the U. S. for the Southern Dist. of New York.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and James Peck, Lib'lnts and Appellants,
vs.
THE PROPELLER COMMERCE, her tackle, &c., the Commercial Transportation Company, Cl'nts and Appellees.

STATE OF ILLINOIS,
Northern Dist. of Illinois, ss.

James Peck, being duly sworn, says that he is one of the libellants and appellants in the above entitled cause; that he is advised by A. P. Grant, of the city of Oswego, in the State of New York, who is the proctor and counsel of the above libellants herein, and believes such information to be true, that the testimony of William C. Carter, who resides at Delavan, in the State of Wisconsin, is necessary and material for said libellants, on the hearing of the reference of this cause now pending before K. G. White, esq., U. S. commissioner, residing and keeping an office in the city of New York.

The said Carter was a clerk in the office of F. L. Littlejohn, now deceased, at Albany, in the State of New York, in 1852 and 1853, and during the entire period in which said L. S. Littlejohn had charge of the canal-boat Isabella, and the property saved from her at the time she was sunk in the Hudson river, in a collision with said propeller Commerce; and it is to prove the account of said Littlejohn, and the moneys paid out by him, that the testimony of said Carter is desired in this case. This deponent further says that this cause was commenced by filing a libel in the district court of the United States for the said southern district of New York, by said libellants, and was heard upon the pleadings and proofs taken therein, and that said libellants took an appeal from a decree against them, in said district court, to said circuit court of the United States, in the southern district of New York; and that upon said appeal this cause was heard, and a decree rendered therein, upon the merits, in favor of said libellants, and in said decree the said circuit court referred the case to K. G. White, esq., above named, to take proofs and report to the said court the amount of damages the said libellants are entitled to recover under said decree; that said White resides in the city of New York, and has there taken testimony on said reference and said hearing, and the proofs taken herein *on* to be used before him, at his office in the city of New York, and such testimony is to be used before said White, wherein it can be obtained; that the persons interested in and who compose the company known as the Commercial Transportation Company reside in the State of New Jersey and in Pennsylvania, as deponent is informed and believes, and that C. L. Benedict, esq., the proctor for the claimants herein, resides and keeps a law office in said city of New York, and at a distance of more than one hundred miles from Chicago, the place where this deponent expects the examination of said witness Carter will be held.

JAMES PECK.

Subscribed and sworn to before me, this 6 day of Oct., A. D. 1857.

G. W. BALDWIN,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Northern Dist. of Illinois, ss.

On this 16th day of December, in the year of our Lord 1857, before me, George W. Baldwin, a commissioner duly appointed by the circuit court of the United States for the northern district of Illinois, under and by virtue of the act of Congress for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, passed Feb'y 20, 1812, personally appeared at my office, in the city of Chicago, in the said northern district of Illinois, William C. Carter, a witness on the part of the libellants, in a certain civil cause of admiralty and maritime jurisdiction, now pending in the circuit court of the United States for the southern district of New York, wherein Henry Fitzhugh, De Witt C. Littlejohn, and James Peck are libellants against the propeller Commerce, her boilers, and the Commercial Transportation Company are claimants; which said case has been referred to K. G. White, esq., U. S. commissioner for said district, residing in the city of New York, to ascertain and report the amount due and payable to the libellants in said cause.

William C. Carter, having been by me first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, did thereupon depose and say:

I reside in Delavan, in the State of Wisconsin; I am fifty-seven years old; I am a farmer; I have resided three years in Delavan; I removed from the city of Albany, in the State of New York; I had resided in Albany about seven years; I was there engaged in the transportation business in the office of the Old Oswego Line, of which L. S. Littlejohn was the agent. He was agent during the whole time I was connected with the company. Mr. Littlejohn died nearly three years ago this coming winter. While there I was familiarly acquainted with all the business details of the office; I had charge of and kept the books of the office. I recollect the canal-boat Isabella; it was sunk in the Hudson river, in the month of August, 1852; she was bound from New York to Albany, and was loaded with merchandise; she sunk a little below the nine-mile tree, about nine miles from Albany. Mr. Littlejohn had the direction for raising the Isabella, repairing her, and saving what goods could be saved on board of her. I assisted him in raising the boat, taking her up to Albany, and saving her cargo. The boat was repaired by W. J. Wheeler, at his yard at the lower aqueduct, above Cohoes falls, in Albany county, New York. The account of all the expenses incident to raising the boat, repairing

her and saving the goods on board of her, was kept by L. S. Littlejohn, at the office in Albany. I have seen to-day the account kept by Littlejohn, and in his handwriting. The paper now shown me and marked Exhibit A, is a true copy of the said original account. I have looked over all the items of the account and examined them, and I recognise this account to be a true statement of the expenses incurred, as made and charged at the time. This account includes the charges of W. J. Wheeler for repairing the canal-boat, and the amount of the whole of Mr. Littlejohn's account, including Mr. Wheeler's charges, is nineteen hundred and thirteen dollars and sixty-six cents ($1,913 $\frac{66}{100}$.) In addition to this is an account of two hundred and three $\frac{25}{100}$ dollars, charged by Mr. Littlejohn, not included in the above footing. The items of this last bill are, $2 75 for canvass used upon the boat Isabella, and fifty cents paid for affidavits, and $200 00 for the services of Mr. Littlejohn and his clerks, superintending the raising of the boat and saving and disposing of the property. This last account was paid from the proceeds of the sale of goods saved from the Isabella, as per statement contained in Exhibit B, now shown me and hereto attached.

The items charged in the bill, and incurred by Mr. Littlejohn in the repair of the Isabella and the saving of her cargo, were as economically conducted as they could be. With reference to the items for raising the wreck and engine by the Screw Dock Company, we undertook to make a contract with them to do the job, and the lowest sum they were willing to contract for was five hundred dollars. By employing them by the day, and superintending the work, we finally got it done for three hundred and sixty-seven $\frac{50}{100}$ dollars ($367 50). The two items, one for roasting and the other for drying coffee, were also considerably under the current rates; we procured this result by making a special contract for this work; Mr. Littlejohn paid Capt. Smith, who assisted in raising the boat, for sixty-nine days' services at the rate of ten shillings a day, amounting to $86 25. This was a very reasonable charge. For new furniture to replace the old that had been destroyed $60 06. I consider that these purchases were made at reasonable rates. In the bill are two items expended by me, amounting to $2 62, which were incurred by me, and are correct. Ffteen dollars was paid to G. W. Stanton for five days' use of storehouse. This was as low as storage could be obtained at that time. The cooperage ac. I remember to be correct; also a charge of $17 for a basket. Mr. Littlejohn paid Jagger, Treadway & Perry $20 50 for cleaning an engine that was knocked overboard from the boat Isabella. He also paid for fishing up iron that was knocked overboard $10 00, and to several persons for taking goods from the boat $17 38. We went down for the wreck to raise her with a steam-tug and two dry-dock boats, which were left there, and it took us about eight

days to raise the wreck above water sufficiently to tow her to Albany, and we then went down with another tug and towed up the wreck. We had afterwards to go down with the dry-dock boats and raise the engine, and were detained on this occasion some two or three days, when we were again towed up to Albany.

From Albany the wreck was taken to Greenbush to repair her bows, in order to put her into a condition to be taken up to Wheeler's, at Cohoes, where repairs could be done cheaper than they could at Albany.

From Greenbush, after the necessary repairs, she was towed to Troy by a tug, and thence to Cohoes by horses. The wreck was first left outside of the basin near the malt-house, with the design of taking out the coffee there to save cartage, but this was found impracticable on account of the other merchandise on top of the coffee, and we therefore carried her into the basin.

The several amounts paid by Mr. Littlejohn, as charged in Exhibit A, were reasonable and usual charges for the work done. The amount paid to E. E. Platt, for seven days' work, at twelve shillings a day, was a low figure for his services. He was also paid ten dollars for men employed by him in cleaning and oiling the rusted machinery. For repacking two casks of crockery we paid $1 50, which was a moderate charge. For oil and sundry articles for cleaning goods we paid $3 64, the lowest market price. The payment to James Cader I remember to be correct; also the payment to Peter Mullen; the services were rendered and the charges very fair and reasonable. We bought a load of clay for $1 00 to *paddle* the boat with in order to get her into dry-dock. We also bought grappling-irons to fish up iron, for which we paid $1 35. Capt. Smith's railroad fare from and to Albany from the wreck to obtain materials, &c., to save the wreck, amounted to $2 59, which was paid. We paid for carting sixteen loads of coffee to the malt-house $16 00, which was very reasonable. The two items for expenses of Capt. Smith, amounting to $4 93, I know to be correct. Mullen's expenses to Albany, and for notary's fees of $1 75, are also correct.

Mr. Chase's bill for roasting coffee, amounting to $110 75, we paid; and also Mr. White's bill, $178 62, for drying the coffee. These are both very fair.

After the boat was repaired she was towed from the dry-dock to Albany, for which we paid five dollars.

We paid Mr. Wheeler's bills for repairing the boat Isabella, amounting to $883 82; this was paid by Mr. Littlejohn, and I now hold in my hand the original bill rendered by Mr. Wheeler, and receipted by him, of which Exhibit C, hereto attached and now shown me, is a true copy.

In August we paid the expenses of George Viele to New York to make affidavits, amounting to $8 00.

The credits contained in Schedule B comprise the entire amounts of receipts from the sale of the damaged goods saved from the cargo of the Isabella; some goods were entirely destroyed, others were sent forward, and those sent by Mr. Littlejohn were too much damaged to be sent forward. The best disposition was made of them that could be.

Mr. Littlejohn was a very careful and prudent man in business matters, and kept his accounts with great accuracy.

WILLIAM C. CARTER.

Subscribed and sworn to before me, this 16th day of Dec., 1857.

G. W. BALDWIN,
U. S. Com'r for Northern Dist. of Ill.

Exhibit A.

G. W. BALDWIN,
U. S. Com'r.

Statement of expenses attending the sinking of boat Isabella.

1852.			
Aug. 21.	For paid time and expenses Geo. Viele to N. York, to make affidavit		$8 00
	" W. C. Carter, expenses to wreck		1 03
23.	do. do.		1 59
Sept. 1.	" basket to handle coffee		1 00
	" rent of G. W. Stanton's store, 5 days, to deposit goods		15 00
	" cooperage sundry articles		1 00
2.	" Jagger, Treadwell, and Perry, for cleaning machinery		20 50
3.	" fishing up iron, and bringing it to Albany		10 00
	" sundry persons for labor, handling goods from boat		17 38
	" towing boats down to raise wreck		12 00
	" " " and wreck to Albany		24 00
	" " " after engine		10 00
	" " " and engine to Albany		15 00
	" " " and wreck to Greenbush		3 00
	" " wreck to malt-house and into basin		2 00
5.	" " " dry dock		5 00
	" Screw Dock Co., 10½ days boats and men raising wreck and engine		367 50
	" E. E. Platt, 7 d'ys superintending cleaning goods, at 12 s		10 50
	" am't p'd for labor		10 00

Sept.	5.	For repacking 2 casks crockery		$1 50
		" oil and sundry articles for cleaning goods		3 64
		" Jas. Cader, 7½ days raising wreck		7 50
		" P. Mullen, 13 d'ys and 2 nights		15 00
		" load of clay to puddle boat		1 00
		" grappling iron to fish for lost articles		1 25
	10.	" R. R. fare, ferriage, &c., Capt. Smith		2 59
		" carting coffee to malt-house, 16 loads		16 00
		" expense to Cohoes and back, Capt. Smith		67
	15.	" " N. Y. to enter protest, Capt. Smith		4 26
	21.	" P. Mullen, expense to Albany to make aff't		1 00
		" fees of notary, taking aff't and seal		75
Oct.	15.	" S. A. Chase & Co., for roasting coffee		110 75
	27.	" J. G. White, for drying coffee at malt-house		178 62
		" towing b't Isabella from dry-dock to Albany		5 00
	29.	" W. J. Wheeler, bill of repair, b't Isabella		883 32
	30.	" Capt. Smith, for 69 days at raising and repairing do., 10 s		86 25
		" new furniture, to replace what was destroyed		60 06
				1,913 66

Cr.

By sales damaged goods	1,291 08
	$622 58

Albany, Oct. 30, 1852. Chgd. to acc.
H. FITZHUGH & CO.,
L. S. LITTLEJOHN, *Ag't.*

Exhibit B.

G. W. BALDWIN,
U. S. Com'r.

Owners of Propeller Commerce,
To H. Fitzhugh & Co., Cr.

1852.

Oct. 1.	By sale damaged goods at auction in Albany	$1,194 02
	" sale coffee at Cincinnati	300 31
	Less	1,494 33

Oct. 1.	Paid for canvass used	$2 75	
	" " affidavit	30	
	" L. S. Littlejohn and cl'k, superintending saving and disposing of the property	200 00	
			203 25
			$1,291 08

Exhibit C.

G. W. BALDWIN,
U. S. Com'r.

Old Oswego Line, per boat Isabella,
To Wm. J. Wheeler, Dr.

For dockage		$2 00
41⅞ days' labor by foreman, 16 s		83 75
173 " journeyman, 14 s		302 75
3,693 feet B. M. oak-lumber, 3 c		110 79
571 " chestnut, 3 c		17 13
1,088 " pine, 2 c		21 76
712 " pine, 3 c		21 36
1,065 " pine, 3½ c		37 27
170 " beach, 2½ c		4 25
442 lbs. wro't spikes, 9 c		39 78
212 " cut spikes, 7 c		18 84
197 " cut nails, 5 c		9 85
106 " oakum, 9 c		9 54
100 " pitch, 3 c		3 00
24 " futtocks, 3 s		9 00
14 inches oak knees, 2 s		3 50
Cash paid for matched stuff		8 89
" cotton		85
" trimming for door, sash, and lockers		6 39
" sash and doors		5 10
" lath nails		18
" cherry for tiller		63
" lead and copper		1 55
643¾ lbs. spike-bolts, 9 c		5 83
47¾ " bolts and nails, 9 c		4 29
38 " travellers and rings, 9 c		3 42
97⅓ " band iron, 9 c		8 78
27¾ " small iron knees, 9 c		2 50
154 " iron or bow-rail, 9 c		13 86
49 " rivet-bolts, 9 c		4 41
461½ " wale irons, 9 c		41 53
126 " " on stern, 9 c		11 34
131 " stern wale iron, 9 c		11 79

14 lbs. guard wale iron, 9 c	$1 26
16 " iron window-rods, 9 c	1 44
Wrought nails	1 25
Fitting iron on rudder-blade	1 06
Trimmings for windows	73
Iron on gang-plank	1 06
25 f't white wood, 3 c	75
1¾ days' labor by foreman, 16 s. ex	3 50
3¼ " journeyman, 14 s. ex	5 69
102 meals board by Capt. Smith, 1 s	12 75
Mr. Jackson's bill for painting	49 80
	$901 20

Cr.

By 175 lbs. old iron, 1½ c	$2 63	
50 " cut nails ret., 5 c	2 50	
		5 13
		896 07
Deduct am't Capt. Smith's board		12 75
		883 32
Add iron rods for boat		2 00
		$885 82

Albany, Oct. 29, 1852.

Rec'd paym't,

(Signed) WM. J. WHEELER.

Cr. Nov. 5, '52.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss.

I, George W. Baldwin, a commissioner duly appointed by the circuit court of the United States for the northern district of Illinois, under and by virtue of an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, passed Feb'y 20, 1812, do hereby certify, that the reason for taking the foregoing deposition is, that the testimony of the witness aforesaid is necessary in the cause in the caption of the said deposition named; and that he resides at Delavan, in the State of Wisconsin, more than one hundred miles from the city of New York, where the hearing of this cause is now pending before K. G. White, a U. S. commissioner residing in said city, to whom the said above entitled case was referred by said circuit court, to take proof and report the same to said court.

That James Peck, one of the libellants in said cause, personally appeared before me this 16th day of Dec'r, A. D. 1857, and made

oath to the above facts; and also, that the persons interested, and who compose the Company known as the Commercial Transportation Company, who are claimants in said suit, more than 100 miles from the city of Chicago, in said northern dist. of Illinois, where this deposition was to be taken; and that the proctor of said claimant also resided more than 100 miles from said city of Chicago; which said affidavit, subscribed and sworn to by the said James Peck, before me, is attached hereto, and reference to said affidavit hereby expressly made.

And the said James Peck requested me that the said William C. Carter might be examined according to the directions of the act of Congress in such case made and provided; whereupon I ordered that the said William C. Carter should be examined de bene esse before me, at my office, in said city of Chicago.

And the said William C. Carter appearing before me at my office this 16th day of Dec'r, A. D. 1857, together with the proctor for the libellants, I have, therefore, proceeded with the said examination.

And I do further certify that the said witness was by me carefully examined and cautioned, and sworn to testify the truth, and the preceding deposition was reduced to writing by me, and signed by the said witness in my presence; and that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in any way in the event of the cause named in the said caption.

S. W. BALDWIN,
U. S. Commissioner for the
Northern District of Illinois.

[L. S.]

U. S. OF AMERICA,
Northern Dist. of Illinois.

I, William H. Bradley, clerk of the circuit court of the United States of America for the northern district of Illinois, seventh circuit, do hereby certify that I am well acquainted with the handwriting of S. W. Baldwin, whose name is subscribed to the annexed certificate, and that the signature to the same is in his proper handwriting; and I do further certify, that he was, at the time of signing the same, a U. S. commissioner duly appointed by the circuit court of the U. S. of America for the northern district of Illinois, seventh circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court, this sixteenth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, and of our independence the eighty-first year.

[L. S.]

WM. H. BRADLEY, *Cl'k.*

United States Circuit Court, Southern Dist. of New York, 2d circuit.—In Admiralty.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and James Peck, Appellants,
vs.
THE PROPELLER COMMERCE, her boiler, &c., the Commercial Transportation Company, claimants, Appellees.

NORTHERN DISTRICT OF NEW YORK, *ss.*

De Witt C. Littlejohn, being sworn, says that he is one of the libellants and appellants in the above entitled cause; that Henry Smith, who resides in Saratoga county, in the State of New York, is a necessary and material witness for said appellants, on the hearing of this cause before K. G. White, esq., of the city of New York, commissioner, to whom said cause is referred. This cause originated in the district court of the United States, for the southern district of New York, and from the decision thereof made in that court said appellants took an appeal to this court, where said cause has been heard and decided in favor of said appellants; and said circuit court made an order that said cause be referred to said White to take the proofs, &c., and report as to the amount which may be due to said libellants and appellants. This deponent further says, that the said The Commercial Transportation Company is a company created by the laws of the State of New Jersey, as deponent is informed and believes, and that the individuals composing said company severally reside, as deponent is informed and believes, in Princeton, in said State of New Jersey, and about fifty miles from the city of New York, as he is also informed and believes, and more than one hundred miles from the city of Albany.

That C. L. Benedict, esq., is the proctor herein of said claimants, and that said Benedict resides in the city of New York, and more than one hundred miles from the city of Albany, where it is expected the said witness will be examined. The said Henry Fitzhugh and this deponent reside in the city of Oswego, and said James Peck resides in Chicago, in the State of Illinois.

DE WITT C. LITTLEJOHN.

Sworn and subscribed, this 25 day of Aug., 1858, before me.

R. J. HILTON,
U. S. Commissioner for Northern Dist. of New York.

U. S. Circuit Court, Southern Dist. of N. Y.

HENRY FITZHUGH and al., Lib'lnt and App'lnt,
vs.
THE PROPELLER COMMERCE, The Commercial Transportation Company, Cl'mt.

NORTHERN DISTRICT OF NEW YORK.

I, A. P. Grant, being sworn, says that he is the proctor for the lib'lnt in the above entitled case, and has examined the witnesses herein, and tried said cause, and is well acquainted with all the facts and circumstances connected therewith, as he believes. That, in his opinion, Henry D. Smith, of Saratoga county, is a necessary and material witness for said appellants; that deponent has frequently inquired for and tried to find said Smith, to take his testimony as a witness herein, and has this day learned that Smith is in the city of Albany, and is soon to leave for Montreal and Canada East.

A. P. GRANT.

Sworn and subscribed, this 25 day of Aug., 1858.

R. J. HILTON,

U. S. Commissioner for Northern Dist. of New York.

UNITED STATES OF AMERICA,

Northern District of New York, City, County of Albany, ss.

Be it remembered, that on this 25th day of August, in the year of our Lord one thousand eight hundred and fifty eight, I, Robert J. Hilton, a commissioner, duly appointed by the circuit court of the United States for the northern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,' passed March 1st, 1817," and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, upon the annexed aff't and process, did call and cause to be and personally appear before me, at my office, No. 74 State St., in the city of Albany, in the said northern district of New York, in the State aforesaid, Henry D. Smith, of Northumberland, in the county of Saratoga, N. Y., to testify and the truth to say, on the part and behalf of the lib'lnt and appellants' in a certain suit or matter of controversy now depending and undetermined, in the circuit court of the United States for the southern district of New York, wherein Henry Fitzhugh, De Wit C. Littlejohn and James Peck are appellants and libellants, against the Propeller Commerce, her boiler, &c., the Commercial Transportation Company, clm'ts and appellees. And the said Henry D. Smith, being about the age of 36 years, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine him, and he did thereupon depose, testify and say as follows, viz:

I am thirty-six years old; reside in Northumberland, in the county of Saratoga, in the State of New York, and am by occupation a boatman on the navigable waters between the cities of New York and Montreal, and am the master of the canal-boat William Burling, of Schuylerville, N. Y., and I am now in the city of Albany, on a return trip from the city of Montreal, C. E., and intend to return to Montreal city as soon as I can unload at Albany. In A. D. 1852, I was master of the canal-boat Isabella, and she was owned by the libellants in the above entitled suit, and I ran her for them, in the season of navigation of 1852. In August, A. D. 1852, the said canal-boat Isabella was loaded with merchandise, at the city of New York, for a trip from thence to Oswego; she left the city of New York about the 19th day of August, A. D. 1852, in a tow that was towed by the steamboat Indiana; the Isabella and the barge Cleveland were side by side in that tow. We proceeded up the river, in said tow, without meeting with any difficulty until a collision occurred between the said Isabella and the propeller Commerce, some ten or twelve miles below the city of Albany. I was aboard the Isabella from the time she left New York until and at the time of such collision, and had charge of her as master. None of the freight or loading on board the said Isabella, when she left the city of New York on said trip, had been removed or disposed of from said canal-boat before the said collision, but all of it remained on board; none of it could have been removed without my knowledge. After said collision I remained on her until she was raised, repaired and put into the line again, and then ran her for the remainder of the season of navigation. In A. D. 1852 she was repaired by William J. Wheeler, at his yard in Watervliet, in the county of Albany.

I assisted in raising the Isabella and taking her up to Mr. Wheler's yard for repairs, and remained there during the whole time she was being repaired; she was repaired in a good and substantial manner, and as economically as it could be done well, and no more repairs were done to her than was necessary to put her in as good condition as she was previous to the collision and injury; I think Wheeler's charges for said repairs were as reasonable, if not more so, than they could be done for at any other yard in the vicinity of Albany. Mr. Wheeler's bill for repairing the said Isabella *and* upwards of $800; I do not recollect the exact amount. L. S. Littlejohn was the agent of the libellants at the city of Albany at that time; and he made the agreement with said Wheeler for the repair of the said Isabella after the accident. The bow stem of the Isabella was entirely gone; her breast-hooks and hoods were badly broken, and she required new futtocks to her framework, and all her upper works were torn off clean down to her decks, including the combings to the hatches, and her cabins; she also required a new bow and stern. After we

raised her, we took the Isabella to the Greenbush side, and fixed her bow by putting plank in the inside, and filling in with clay, and covering the same with canvass on the outside; her repairs were completed at Wheeler's yard, about the last of October, 1852; I kept all my men with me on the Isabella, from the time of the collision until we got her raised, and took her to Wheeler's dock; it was about eighteen days from the time the collision occurred on the run, until the Isabella arrived at Wheeler's yard for repairs; my crew was composed of three men, besides myself and the cook, on that trip.

H. D. SMITH.

Taken, subscribed, and sworn to before me, on this 25th day of August, 1858, at city of Albany, N. Y.

R. J. HILTON,
U. S. Commissioner for Northern District of N. Y.

United States of America.

NORTHERN DIST. OF NEW YORK,
Albany County and City, ss.

I, Robert J. Hilton, a commissioner duly appointed by the circuit court of the United States for the northern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, passed Feb'y 20th, 1812, and the act of Congress entitled An act in addition to an act entitled An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, passed March 1st, 1817, and the act entitled An act to establish the judicial courts of the United States, passed Sept. 24th, 1789, do hereby certify, that the reason of taking the foregoing deposition is, and the fact is, that the witness, Henry D. Smith, resides and is more than one hundred miles distant from the place of trial of the said action. I further certify, that no notification of the time and place of taking the said deposition signed by me was made out and served on the opposite parties, or their attorneys, to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit, because the said adverse party does not, as I know or believe, reside within one hundred miles of the place of the taking the same, nor has said adverse party any agent or attorney known to me within that distance. I further certify, that on the twenty-fifth day of August, A. D. 1858, I was attended by A. P. Grant, the counsel of the libellants, and by the witness, Henry D. Smith, who is of sound mind and lawful age, and the witness was by me first carefully examined, and cautioned and sworn, to testify the whole truth, and the deposition was by me reduced to writing in the

presence of the witness; and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of transmitting the same by mail to the court for which the same are taken.

And I do further certify, that I am not of counsel or attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand and seal, this 25 day of August, in the year of our Lord one thousand eight hundred and fifty-eight.

R. J. HILTON,
U. S. Commissioner Circuit Court of the United States for the Northern District of New York, in the Second Circuit.

Com. fees.....	$5 00
Postage.....	06
Witness's fee....	1 50
Pd. by liblnts...	6 56

Endorsed: U. S. Circuit Court, Southern district of New York. Henry Fitzhugh & al. vs. The Propeller Commerce, &c., Appellees. Dep. of Henry D. Smith.

A. P. GRANT,
Proct. for Liblnt., Oswego, N. Y.

Opened in open court, and filed Sept. 16, 1858.

Supreme Court of the United States.

HENRY FITZHUGH, DE W. A. C. LITTLEJOHN, and James Peck, Libellants,
vs.
THE PROPELLER COMMERCE, &C., The Commercial Transportation Co., Clm'ts and Appellants.

It is stipulated and agreed between the parties in the above entitled cause, by their respective proctors herein, that upon the argument of this cause in this court it shall be conceded that the libellants, on the hearing of said cause before K. G. White, esq., U. S. commissioner, to whom the same was referred, introduced and read in evidence, under objections of the claimants, certain original bills of goods from various merchants in this city to various merchants in the country, which were marked by said commissioner as vouchers from number 1 to number 32. That said bills respectively contained the names of the city merchants, the sellers, the names of the country merchants, the buyer, the property or

goods sold at the prices at which such goods were sold by such merchants, and the dates of such sales, and that the aggregate amount of such sales as mentioned in said bills was the sum of $8,139 10.

A. P. GRANT, *Proct. for Libl'nt.*

Endorsed: Supreme Court of U. S. Henry Fitzhugh & al. vs. The Propeller Commerce, &c. Stipulation. Benedict, Burr & Benedict, proctors.
Filed Dec. 9th, 1859.

Commissioner's Report.

Circuit Court of the United States for the Southern dist. of New York.

HENRY FITZHUGH et al.
vs.
THE PROPELLER "COMMERCE," her tackle, &c.

In pursuance of a decretal order made in the above entitled cause on the 18th day of September, in the year of our Lord one thousand eight hundred and fifty-seven, by which, among other things, it was referred to the undersigned, one of the commissioners of this court, to ascertain and compute the amount due the libellants for their damages, and to report thereon to this court with all convenient speed—

I, Kenneth G. White, the commissioner to whom the matter was referred, do report, that I have been attended by the proctor for the libellants, and by the proctor for claimants, and have taken and examined the testimony offered in support of the libellants' claim, and *due* find that there is due to the libellants the sum of eight thousand one hundred and thirty-nine dollars and ten cents ($8,139 10), and interest on the same amounting to three thousand three hundred and four dollars and five cents ($3,304 05), in all amounting to the sum of eleven thousand four hundred and forty-three dollars and fifteen cents ($11,443 15); and I do further report, that in said sum of ($11,443 15) *and I do further report, that in said sum of* $11,443 15, is included the sum of $246 53 for damages paid to George Worthington & Co. by libellants, with $104 77 interest on the same, amounting in all to $351 30, and also the sum of $194 94 for damages paid by libellants to J. F. Clark, with $80 81 interest on the same, amounting in all to $275 75; and also the sum of $101 94 for damages paid by libellants to W. J. Gordon, with $47 42 interest on the same, amounting in all to the sum of $149 63; and also the sum of $405 95, (being the balance due the libellants for expenses in raising and repairing the canal-boat Isabella, and saving her damaged cargo, after deducting therefrom the proceeds of sales of damaged goods,)

with $171 61 interest on the same, amounting in all to the sum of $577 56.

Dated the 13th day of November, 1858.

All which is respectfully submitted.

KENNETH G. WHITE,
U. S. Commissioner.

Endorsed: U. S. circuit court for the *U. S. circuit court for the* southern district of New York. Henry Fitzhugh et al. vs. The Propeller Commerce. A. P. Grant, proct. for libl'nt. Commissioner's report.

May 19, 1859.

Confirmed.

S. NELSON.

Filed the 13th day of Nov., 1858.

U. S. Circuit Court.

THE PROPELLER COMMERCE, &c.
ads.
HENRY FITZHUGH, &c.

The claimants except to the report of the commissioner in this cause for the following reasons, to wit:

First exception. Because the commissioner has admitted incompetent and irrelevant testimony, and overruled the claimant's objection thereto, as by the testimony appears.

Second exception. Because the commissioner allowed the libellants to give in evidence payments made for goods not proved to have been on board the vessel at the time of the collision.

Third exception. Because the commissioner has allowed to the libellants various and large sums of money claimed by the libellants to have been paid, and without suit, to the various consignees of the cargo, when there is no proof that such sums were due, or that the respondents were liable therefor, or that the cargo was damaged by the collision to such amounts.

Fourth exception. Because the commissioner has allowed the libellants certain sums of money claimed to have been paid to George Worthington and J. F. Clark, which sums the said Worthington and Clark are not entitled to, and which the respondents are not liable for.

Fifth exception. Because there is no proof of the amount of damage to the cargo.

Sixth exception. Because the commissioner has reported $8,139 $\frac{10}{100}$ as due to the libellant, when the proofs show that such sum was not due.

Seventh exception. Because the commissioner has allowed interest.

BENEDICT, BURR & BENEDICT,
Proct. for Cl'nt.

To KENNETH G. WHITE, *U. S. Cr.*

Endorsed: U. S. circuit court. The Prop. Commerce, &c., ads. Henry Fitzhugh, &c. Exceptions to Commissioner's report. KENNETH G. WHITE, ESQ.

Filed Nov'r 17, 1858.

At a special term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on the twentieth day of May, in the year of our Lord one thousand eight hundred and fifty-nine. Present, the Honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and James Peck, Lib'lnts and App'lnts,
vs.
THE PROPELLER COMMERCE, The Commercial Transportation Company, Claimants and Respondents.

This cause came on to be heard before this court, to be heard upon the report of Kenneth G. White, esq., appointed a commissioner to make a report therein, bearing date the 13th day of November, 1858, and it appearing by the said report that there was then due the libellants, on account of the loss and damage by them sustained by reason of the collision mentioned and set forth in the libel in this cause, the sum of eleven thousand four hundred forty-three dollars and fifteen cents, on motion of Mr. A. P. Grant, proctor for the libellant, it is ordered, adjudged and decreed, that the said report, and all things therein contained, do stand ratified and confirmed. And it is further ordered, adjudged and decreed, that the said libellants ought therefore to have and receive the said sum of eleven thousand four hundred forty-three dollars and fifteen cents, with interest thereon from said 13th day of November, A. D. 1858, together with their costs and expenses of said suit, both in this court and in the district court of the United States of America for the southern district of New York, where this cause was originally commenced, to be taxed; which said costs and expenses of said libellants in this court have been taxed at the sum of one hundred and forty-two dollars and seven cents, and the costs and expenses of said libellants in this cause in said district court have been taxed by the clerk of said court at two hundred thirty-three dollars and thirty-eight cents. And it appearing to the court that the said propeller Commerce has been delivered out of the custody of the marshal to said claimant, in virtue of two stipulations executed by the said The Commercial Transportation Company, by William G. Cook, its president, and by Andrew D. Melick and Edward Cooper, as sureties; one of said stipulations

being for value in the sum of ten thousand dollars, conditioned to abide the decree of the court in this cause; and the other stipulation being in the sum of two hundred and fifty dollars, conditioned to pay the libellants' costs and expenses in this cause:

Now, therefore, it is ordered and decreed, that judgment be accordingly entered against the said The Commercial Transportation Company, and against the said Andrew D Melick and Edward Cooper, the sureties aforesaid, for the aforesaid sum of ten thousand dollars, with the interest thereon, from the 13th day of November, 1858, and also in the sum of two hundred and fifty dollars, the costs and expenses of said libellant, with the interest thereon, from said 13th day of November, 1858, the interest on said sums amounting to the sum of three hundred sixty dollars and fourteen cents; and that such judgment be entered up in this cause against the said The Commercial Transportation Company, and against the said Andrew D. Melick and Edward Cooper, sureties as aforesaid, for the sum of ten thousand six hundred ten dollars and fourteen cents.

And it is further ordered, adjudged, and decreed, that *that* if the said claimant and respondent shall fail to make the said payments, execution to them forthwith issue against it, and its sureties, upon the said stipulations.

And it is further ordered, adjudged, and decreed, that if the said claimants and respondents shall make the payments of said sum of ten thousand six hundred ten dollars and fourteen cents, so hereinbefore provided in such case, it and its sureties be forever exonerated from all other and further payments in the premises.

Endorsed: Circuit Court U. S., South'n dist. of New York. Henry Fitzhugh et al., liblnts., vs. The Propeller Commerce, the Commercial Transportation Co., claimant and respondent.

Final decree. A. P. Grant, proctor.

Ordered, That the within decree be entered nunc pro tunc, as of May 20, 1859.

Dec. 2, 1859.

S. NELSON.

Filed as of the 20 May, 1859, this 2d Dec'r, 1859.

Supreme Court U. S. America.

HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and James Peck, Libellants, Appellees,
vs.
THE PROPELLER COMMERCE, her tackle, &c., the Commercial Transportation Company, Claimants, Appellants.

To Messrs. Benedict, Burr & Benedict:

Gent: I appear as the proctor of the appellees in the above entitled cause, of which please take notice.

Yours, truly,

A. P. GRANT,
Proctor for Appellees.

Oswego, June 23, '59.

Circuit Court of the United States.

The Steamboat Commerce, her tackle, &c., The Commercial Transportation Company, Claimant and Appellant, ads. Henry Fitzhugh, De Witt C. Littlejohn and James Peck, Respondents and Appellees.

To the honorable the Supreme Court of the United States:

The appeal of the Commercial Transportation Company, the above named claimant and appellant, respectfully showeth: That on the 27th day of August, A. D. 1852, the above named Henry Fitzhugh, De Witt C. Littlejohn and James Peck, filed their libel in the district court of the United States for the southern district of New York, against the steamboat Commerce, her tackle, apparel, &c., in a cause civil and maritime, for the recovery of damages alleged to have been sustained by them to the barge Isabella and her cargo, by collision with the said steamboat Commerce, on the Hudson river, in the State of New York, and that the said steamboat was arrested upon process issued aforesaid libel, and was discharged on your petitioners' filing a claim and entering into stipulations; and your petitioners thereupon filed their answer to said libel, and such proceedings were had in the said cause, that on the 16th day of Dec'r, 1854, a final decree was made by the said district court, wherein it was adjudged and decreed that the libel of the libellants be dismissed with costs.

That thereafter, and on or about the 23d day of December, 1854, the libellants duly appealed from such decree to the circuit court of the United States for the southern district of New York, and the said cause was removed thereby into the said circuit court, and there tried anew, and a decree made reversing the decree of the district court, and referring it to a commissioner to ascertain and report the amount due the libellants by reason of the collision in the pleadings mensioned.

That thereupon such proceedings were had on the said reference; that afterwards, on the 13th day of Nov., 1858, said commissioner reported due the libellants the sum of $11,443 15.

That thereupon the claimants and appellants duly excepted to

the said report, and said exceptions were duly argued; and on or about the 19th day of May, 1859, the said circuit court ordered the said report to be confirmed, and it was adjudged and decreed, that the libellants recover against the said steamboat Commerce, her tackle, &c., a decree exceeding two thousand dollars, together with costs, and that the stipulators cause their stipulations to be fulfilled; which said decree of the said circuit court is, as these appellants are advised, erroneous, and ought to be reversed.

Wherefore, these appellants appeal from the whole of said decree *of said decree* of said circuit court to the Supreme Court of the United States, and respectfully pray that the said decree of the said circuit court, and the libel, amended answer, pleadings, depositions, evidence and proceedings, in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause on further proofs to be adduced; and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made dismissing said libel with costs, or such other decree as to the said Supreme Court shall seem just.

BENEDICT, BURR & BENEDICT,
Proct. for Clmts.

Endorsed: U. S. Circuit Court. The S. B. Commerce, her tackle, &c., The Commercial Transportation Co., clmts. and appellants, ads. Henry Fitzhugh & al., liblnts. and appellees. Appeal. Benedict, Burr & Benedict, app'lants' proct. Filed May 30, 1859.

Circuit Court of the U. S. of America, Southern district of New York, in the second circuit.

THE STEAMBOAT COMMERCE, her tackle, &c., the Commercial Transportation Company, Claimants and Appellants,
ads.
HENRY FITZHUGH, DE WITT C. LITTLEJOHN, and Jame Peck, Lib'nts and Appellees.

Know all men by these presents, that we, The Commercial Transportation Company and Edward J. C. Atterbury, whose place of business is No. 30 Platt st., New York city, and Edward Cooper, of No. 8 Lexington Av., in the said city of New York, are held and firmly bound unto the above named Henry Fitzhugh, De Witt C. Littlejohn, and James Peck, in the sum of ten thousand dollars, to be paid to the said appellees; for which payment, well and truly to be made, the said Company, besides itself, and we, the said Atterbury and Cooper, bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

In witness whereof, the said Company have caused their presi-

dent to sign his name and affix the seal of said Company hereto, and we have hereunto set our hands and seals, this twenty-eighth day of May, in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas the above named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make good their appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WM. G. COOK, *President.*
EDWARD J. E. ATTERBURY,
EDWARD COOPER.

Signed, sealed, and delivered in the presence of—
THOMAS J. STYKER, as to the Commercial Transportation Company.

STATE OF NEW JERSEY, *ss.*

I hereby certify *this*, on this 28th day of May, A. D. 1859, before me personally came Thomas J. Stryker, with whom I am personally acquainted, who being by me duly sworn on his oath, said that he is treasurer of the Commercial Transportation Company; that he knows William G. Cook, the president of said Company, *and that he knows William G. Cook, the president of said Company*, and that he knows the seal affixed to the foregoing bond to be the common seal of said Company, and that in deponent's presence the said William G. Cook, president as aforesaid, signed his name and affixed said common seal to the said bond, by order of the board of directors of said Company, and declared that he signed, sealed, and delivered the same as the act and deed of said Company.

In witness whereof, I have hereto set my hand and notarial seal of office.

BARKER GUMMERS,
[L. S.] *Notary Public.*

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Edward J. C. Atterbury and Edward Cooper, being duly sworn, each for himself, saith that he does business in the city of New York, and is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

EDW'D J. C. ATTERBURY,
EDWARD COOPER.

Sworn to before me, this 28th day of May, 1859.

WM. D. JONES,
Notary Public.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

On this 28th day of May, 1859, personally appeared before me, Edward J. C. Atterbury and Edward Cooper, to me known to be the persons who executed the above instrument, and acknowledged that they executed the foregoing instrument for the purposes therein mentioned.

WM. D. JONES,
[L. S.] *Notary Public.*

I approve the within bond as sufficient for the amount of the within obligation.

N. Y., May 30, 1859.

SAM. R. BETTS.

Endorsed: Circuit Court of the United States. The Steamboat Commerce, &c., the Commercial Transportation Co., claimants and appellants, ads. Henry Fitzhugh and al., liblnts. and appellees. Bond on appeal. Filed May 30, 1859.

Filed 28th January, 1860.

Supreme Court of the U. S.

THE COMMERCIAL TRANSPORTATION COMPANY,
Appellants,
vs.
HENRY FITZHUGH and others.

Abstract and Points for Appellants.

On the 20th August, 1852, the propeller Commerce was bound down the Hudson river, from Albany to New-York, with a barge in tow, lashed on her starboard side. About nine o'clock in the evening, when near Mull Island, a few miles below Albany, she met the steamboat Indiana, bound up from New-York, with ten boats in tow, arranged on two independent hawsers, and extending several hundred feet in length. The barge Cleaveland, with the canal boat Isabella lashed on her larboard side, was at the end of the largest line, 900 feet long.

The Commerce passed the Indiana as far to the west as was safe, and having passed the first tier of barges, perceived a light nearly ahead, a very little to the west of his flagstaff, which he supposed to be a vessel at anchor—she slightly sheered to the east to give the light a berth—when suddenly the light proved to be a boat in motion, which headed across, and ran upon the bows of the Commerce,

then drifted off to the eastward, and down the stream, and sank in the middle of the river (*fol.* 115). It proved to be the canal boat Isabella, which, at the end of a hawser some 900 feet long, had swung out of the line of direction of the Indiana—the vessel towing her; and the light seen on her was a lantern in the hand of the captain, who stopped there after lighting a lady passenger over the deck-load to her cabin (*fol.* 116).

The libel was filed August 27, 1852 (*fol.* 4), and the vessel was discharged on stipulation (*fol.* 43).

The answer was filed April 21, 1852 (*fol.* 67).

The hearing of the cause was commenced in the District Court, Feb. 21 to 24, 1854 (*fol.* 82); and the argument was made Oct. 13, 1854 (*fol.*) 181).

The decree of the District Court, dismissing the libel, was made Dec. 16, 1854 (*fol.* 182).

From this decree the libellants appealed, Dec. 23, 1854 (*fol.* 188).

Nov. 12, 1856.—LEWIS ENSIGN was examined as a witness for the libellant.

The cause was heard in the Circuit Court, May 8, 1857, and September 18, 1857. The decree of the Circuit Court was made, reversing the decree of the District Court. The damages were assessed by a commissioner, who reported $11,443 15, besides interest. The claimants excepted to the report (page 83), and on the 20th day of May, 1859, the Circuit Court confirmed the report, and made a final decree in favor of the libellants for amount of the stipulations, with interest, from which decree the claimants appeal to this Court (page 86.)

I.—The allegations of the libel are that the up tow was on the east side of the channel, and that the Commerce, after passing the Indiana and the first hawser in safety, suddenly sheered over to the east side of the channel, and thus struck the canal boat.

This is the only fault alleged against the Commerce, and the libellants have failed to prove it. It is disproved. The proofs show, by a very great preponderance of testimony, that the Commerce passed the Indiana and the first hawser *at a considerable distance to west; that her course was a clear one down the west side;* and that she *continued upon that course, and was on the west side when struck by the canal boat.*

(*a.*) The sheer testified to by the witnesses for the libellants, is only a gross exaggeration of the slight movement of the propeller when she saw the light. It is fully explained by the persons who best knew what they themselves did.

Groesbeck, fols. 159, 166.
Vanderveer, 166.
Sailor, fol. 172.

The Sheer of the Commerce.

"When about abreast of first hawser (2d tier) turned his wheel over about two spokes a-starboard, but before he could observe any change of his course, observed it was a tow and stopped."

Groesbeck, fol. 159 .

"Judges she then swung round six feet."

Do., fol. 159.

"Pilot had hove his wheel a little to starboard,

but did not see she sheered any; thinks barge on her side balanced the move of wheel."

Vanderveer, fol. 166.

"Propeller changed her course a little to east, about time she was abreast of 2d tier, or at their sterns."

Sailor, fol. 112.

The testimony of these three witnesses is confirmed by the statements of four other persons, two on the up tow and the pilots of the Oregon, close behind.

A. Wilson, 134, 136, and 137.
T. M. Wilson.
E. Blake, 149.
C. Blake, 151.

(*b.*) "As propeller passed Indiana, and got down to first tow, she trended rather to eastward, as witness did, but after that he saw no change. It was necessary to so trend, for that was the range of the channel, and she was compelled to go eastward to avoid the sand spit."

A. Wilson, fol. 131.

"She took a turn eastward."

Do., fol. 134.

"Propeller did not make a rank sheer to the east, but bore that way to escape the sand spit and vessel supposed to be at anchor."

Do., fol. 137.

"Did not see any rank sheer of propeller to east. Her course was down the river, as she

passed him, and just after she took a little sheer to east."

E. Blake, fol. 149.

"Saw propeller as she passed him bear off rather east, but of no account; she had no rank sheer."

C. Blake, fol. 151.

(*c.*) The movements of the Oregon, directly behind the Commerce coming down, show that the Commerce took no such sheer as alleged.

The Oregon was close behind and desired to pass. She lapped on the propeller's starboard quarter for that purpose, *but finding her too near the west bank*, she then lapped on her *larboard quarter, to pass on that side*, when the bells rang to stop.

If the Commerce had made a sheer to east it would have been *madness to have attempted to head her off and pass her to east.*

Wilson, 130.

(*d.*) *The manner in which the two vessels came together*, shows that the *Commerce was not sheering to east.*

The Tacony was lashed on the west side of the Commerce, and her stem projected eight feet beyond the stem of the propeller (Vanderveer).

When the vessels came together, the stem of the canal boat struck first the *larboard* bow of the Tacony, between her and the Commerce, and then glanced over to the Commerce. The Cleaveland was not touched. If the Commerce had

been sheering to east the *starboard bow of the Tacony* would have received the blow.

Sailor.

(*e.*) *The place of collision and where the canal boat sunk*, shows that the Commerce had made no sheer to the east.

The boats when struck *were, and must have been, far over on the west side of the channel.*

A. Wilson, fol. 130, 131, 134.
T. M. Wilson, fol. 140.
E. Blake, fol. 147, 148.
C. Blake, fol. 151, 153, 154.
Groesbeck, fol 158, 160.
Lenox, fol. 168–9.
Sailor, fol. 172.

"West side of channel."

A. Wilson, fol. 130.

"Found there was not room to pass her on that side and stopped."

A. Wilson, fol. 130.

"The boats were pretty well to westward in the channel at time of collision."

Do., fol. 131.

"Collision as much as 300 feet west of island."

Do., fol. 134.

"Propeller then just about in range ahead of Oregon, and both on west side of channel."

T. M. Welson, fol. 140.

"Tow was on east side of channel when propeller passed them (scow Bloomer)."

E. Blake, fol. 147.

"Seemed to be pretty well over towards the sand spit."

E. Blake, fol. 148.

"Propeller was on west side of channel when she passed."

C. Blake, fol. 151.

"Can't tell how far over to west the hind boats were; does not think she could have gone west of those boats, nor that there was water enough; can't say positively the depth of water 200 feet west of propeller."

C. Blade, fol. 153.

"Could not say if Cleaveland was above or below head of Mull Island, but she was well over west of it, towards west bank."

C. Blake, fol. 154.

"Lay over as far west as he dared to go, and held his course straight down the river; saw a light ahead and stopped; appeared to be well in to west of him, and supposed she was at anchor; when he first saw the light it was west of his flag-staff over 150 feet."

Groesbeck, fol. 158.

"There was not room west of it for him to pass."

Do., fol. 160.

"Thought his boat was well to west of channel, from the notice he took at time."

Lenox, fol. 168–9.

"Should not like to have gone six feet farther west that night; can't assert the fact, but should expect to go ashore by doing so."

Lenox, fol. 169–70.

"Thinks his boat was pretty well to west of channel; is not a pilot; was on deck looking out; saw the light on tow; it bore to west of his flagstaff; thought his boat was going straight down the river."

Sailor, fol. 172.

After the blow the canal boat was towed *towards the east shore for a considerable distance.*

A Wilson, fol. 136.
T. M. Wilson, fol. 140, 141, 144.
Vanderveer.

"Thinks Isabella went half width of channel, or more, east of place where she was struck."

A. Wilson, fol 136.

"Passed her to west, and thinks she had worked in to the eastward; supposed she had the wreck in tow."

T. M. Wilson, fol. 140.

"After collision, propeller made more room for Oregon, and enough to enable her to pass west, but got as far to west as she could properly go, and supposes, to do that, propeller had worked in eastward."

T. M. Wilson, fol. 141.

"At the place of collision there was room for the stern boats to have gone further east. Propeller was then on west side of middle of channel, and there was rooom enough for Oregon to have gone to east of propeller at place of collision. Boat sunk further east than place of collision. Had she been then as far east, the Oregon would have passed propeller without waiting."

T. M. Wilson, fol. 144.

Yet *she sunk in the middle of the channel*, the channel being but a few hundred feet wide.

Libel.

Hilligan, fol. 174.

The statements of the witnesses, the movements of Oregon, the way the two vessels came together, and the place where the wreck sunk, furnish a mass of evidence perfectly overwhelming that the collision did not happen on the east side of the channel, as alleged in the libel, and that the Commerce could not have been guilty of the only fault alleged against her.

On the other hand, the collision was clearly caused by the negligence of the Indiana and her tows.

II.—The Isabella being towed at the end of a long line, 100 to 150 fathoms, ( ) could easily have sheered the whole width of the channel; she could sheer quickly and with little exertion. Her power to *avoid objects* approaching was therefore far greater than that of the Commerce, which being a propeller, could not stop or back suddenly. The responsibility of avoiding a vessel approaching is therefore thrown upon the Isabella, and she was bound to use all possible means to avoid a collision.

Yet it is not pretended that she made any effort whatever to avoid the Commerce, until it was too late.

She had no lookout on her bows, and no man at her helm. In narrow channels it is customary and necessary to man every boat, and the proof is clear that if the helms of the long tow had been put hard a-port in time, there could have been no collision.

H. B. Smith, fol. 115.
A. Wilson, fol. 133.
E. Blake, fol. 148–9.
C. Blake, fol. 152.
Groesbeck, fol. 161.

The helm should have been manned.

(*a.*) "Thinks if both helms had been ported then, would have got out of her way, but can't say whether it would have run them ashore."

H. B. Smith, fol. 115.

"But in narrow channel generally have a man stationed at helm of each, to steer as directed; with a man at helm of each, these boats could have been steered clear off to east—the width of channel. The best water was east of them."

A. Wilson. (Fol. 133.)

"Thinks it is customary in narrow points of river to have man stationed at helms of tows; with that length of hawser the stern boats might have sheered ashore if they had way enough through the water."

T. M. Wilson. (Fol. 144.)

"If helm of Cleaveland and Isabella had been both put hard-a-port at the time propeller passed him, they would have sheered enough east to have avoided propeller."

E. Blake. (Fols. 148–9.)

"Generally, in his experience, a man is placed at helm of each boat in narrow work; had both these boats put their helms hard-a-port, might have kept clear of propeller, and they had water enough to do it."

C. Blake. (Fol. 152.)

"Thinks if helm of each boat had been put hard-a-port, she would have gone clear."

Groesbeck. (Fol. 161.)

"In a narrow place like that in question, it is not prudent navigation to go with helm lashed."

Miller. (Fol. 175.)

III.—A vessel on the river is guilty of great fault in having a light on deck when under way in a dark night.

It is a well known signal, which all are bound to believe, that the vessel is at anchor—laid up for the night. This is especially true of a barge having no masts or sails. The real intention of the party showing a light, or whether

it were accidental or inadvertent, can make no difference, for the approaching vessel has no knowledge of that intention. It can only see the light, and put upon it the established nautical construction upon the river—that it is a stationary and not a moving object.

Such was, in fact, the construction put upon the light at the time, and the burden is upon the libellants to show that that construction was so unreasonable or improbable as to amount to negligence.

The pilot of the Oregon put the same construction upon the light, and said he should have struck the Isabella if the Commerce had not.

IV.—Vessels forming part of a tow in the night time should be carefully steered, so as to be apparently in line or connection with the towing power. The wind and the tide, and the trim of the sails, are made evidence in usual cases of collision, only because they show the direction, force and character of the power which controls. For the same reason, in the case of a towed vessel, her connection with the towing power must be kept manifest and clear. She must not, therefore, be towed by a line so long that it is out of sight in the water, nor be allowed to be swinging about at random, sheering on this side and that, so as not to be in line with the rest of the tow, and not obviously a part of them. The preponderance of testimony is overwhelming to show that the tows on the long line were not in a line with the Indiana, but so much further to the westward as not to seem to be a part of the tow. They were so far in toward the west shore, that their hawser was entirely clear of the whole tow, four abreast before them, and that they were badly steered, "kept swinging about," (fol.107.)

J. O'Brien, fol. 107.
W. Smith, fol. 108.
A. Wilson, fol. 130–32–33–37.
T. M. Wilson, fol. 141.
E. Blake, fol. 148.
C. Blake, fol. 151.
Groesbeck, fol. 161.
Vanderveer, fol. 166.
Sailor, fol. 172–3.
Van Arsdale, 179.

The Isabella was not in line.

"Heard some grumbling that night about the manner in which the two boats astern were steered. Heard one of his men say they kept swinging about."

J. O'Brien. (Fol. 107.)

"Thinks steamer and her tow were east of middle of channel; knows steamer was; can't say as to stern boats."

W. Smith. (Fol. 108.)

"West side of the channel, and the four were east of them."

A. Wilson. (Fol. 130.)

"Tow was hanging out of way to west of channel. If they had been following their tow, would have been 150 feet further east."

Do. (Fol. 132.)

"Thinks the Isabella was hanging out so far that she would have gone west of point of spit,

and would have brought up on that bar, if she drew much water."

Do. (Fol. 133.)

"If the barges were in line with her (Indiana), and not hanging off to westward, they would have been also to the eastward."

Do. (Fol. 137.)

"Light was not in a straight line with Indiana. She was east of Oregon, and this light opened west of the propeller."

T. M. Wilson. (Fol. 141.)

"Thinks tow was out of its place, and too far west. If it had been as near the east side, thinks the vessels would have gone clear."

Do. (Fol. 141.)

"To west of him, and not directly following the steamer, and seemed to be pretty well over towards the sand spit. If she had been right after her, where she ought to have been, she would have cleared propeller and Oregon."

E. Blake. (Fol. 148.)

"His boat was straight behind Indiana. * * Isabella and Cleaveland were then west of him, and not following behind his boat. Had they kept course witness was on, and straight ahead with him, there would have been no collision—nothing to prevent their doing so."

C. Blake, fol. 151.

"Isabella was not following behind Indiana and second tow. If she had followed that, she would have passed 100 feet east of him."

Groesbeck, fol. 161.

"Light a considerable distance west of second tow."

Vanderveer, fol. 166.

"Saw the wake of second tow and Indiana, and judge the stern tow was 100 feet west of that."

Sailor, fol. 172.

"Had the tows been in wake of Indiana, should have gone clear of them, as propeller was going."

Sailor, fol. 173.

"Looked out and saw the tow out of *larboard* window; vessels all together there."

Van Arsdale, fol. 179.

The testimony of the two Wilsons, the two Blakes, and Van Arsdale, all persons disconnected with the respondents' vessel, must be conclusive upon this point.

V.—A vessel towed by so long a line, variously estimated 100 to 150 fathoms—600 to 900 feet—although in a general manner under the control of the towing vessel, has still an independent will of her own, which, uncontrolled, is subject to caprices and movements dangerous to others, but which cannot be foreseen. An accidental eddy or current, or wave, gives her a rapid sheer on the swing of her line, car-

rying her far in one direction or the other, as chance may influence. Hence, it is her duty to provide independently against these contingencies, as far as practicable. She is bound to have a *competent steersman at her helm*, and a *competent lookout on her bows.*

The fact that she is a canal boat, or a barge, does not excuse her from having a steersman and a lookout. It does not depend upon the shape, or name, or character of a vessel; the rule has no limitation. The rule is, that vessels shall have competent lookouts and steersmen. The necessity is quite as great as in any other vessel.

These considerations have great force in the night time, in any breadth of river; but their force is greatly increased in narrow places, because dangers are there more abundant and various; and at the same time, all vessels are more confined and constrained in their movements. It is customary and necessary, therefore, in such cases, to man and manage every boat; and the proof is clear, that if all the helms had been put to port in time, there would have been no collision.

Yet the Isabella had no lookout on her bows, and no man at her helm. She kept swinging about.

VI.—To all this the libellants allege nothing, except that if the propeller had gone a few feet further to the west she would have avoided the collision. This is not so; but if it were it would prove nothing. It is entirely fallacious. In all collision cases it is true of each vessel, that if she had been at some other place a little distance off, there would have been no collision; but it is not therefore true that both vessels are always in fault.

The captain of the propeller had not (as we have) tried

the cause on all the proofs on both sides; but he was compelled to act, and did act, on the apparent reasonable and probable state of things in the night time, including the false light, the out-of-the-way position, and the negligent management of the libellants in a narrow channel, bounded on the west by sand spits, and shifting bars and shoals. She could not safely go further to the west.

The Commerce could not safely go further to the west.

"Knows the water there, and does not think there was enough water for Oregon to pass west of propeller."

T. M. Wilson, fol. 139.

"Propeller then just about in range ahead of Oregon, and both on west side of channel."

T. M. Wilson, fol. 140.

"There was not water enough for Oregon to go west of propeller."

Do. fol. 143.

"Does not think she could have gone west of those boats, nor that there was water enough."

C. Blake, fol. 153.

"Do not think propeller could have got clear of Isabella by sheering west, without going ashore."

A. Wilson, fol. 156,

"Lay over as far west as he dared to go, and held his course straight down the river."

Groesbeck, fol. 158.

"But 6, 8, or 10 feet west of that, in his judgment, not depth enough for his propeller."

Groesbeck, fol. 163.

"Should not like to have gone six feet further west that night; can't assert the fact, but should expect to go ashore by doing so."

Lennox, fol. 170.

The libellants have failed to show that the collision was caused by any negligence of ours, and it is clearly shown by the whole case that the libellants were themselves guilty of negligence.

E. C. BENEDICT,
Advocate for Appellants.

Opinion of the District Judge, with further Points.

U. S. District Court.

HENRY FITZHUGH et al.
vs.
THE STEAMBOAT COMMERCE, &c.

OPINION OF JUDGE BETTS.

This case is before the court upon a mass of very minute and extended testimony, and by no means wholly reconcilable, as to some facts vital to the determination of the rights of the parties.

The proofs were taken in open court, in February term 1854, but the argument upon the evidence has been delayed by the parties to this period, (October.)

In my judgment the case turns entirely upon the fact, whether the collision, which is the subject of contestation, arose from the fault or negligence of the steamboat Commerce in turning her course abruptly off to larboard, or was owing to the omission of the libellants canal boat, Isabella, in not keeping in the wake of the steamer Indiana, which had her in tow, and from which she was distant, in the rear, from 150 to 300 yards. The occurrence was in the night time, in a narrow point of navigation, upon the North river, near Castleton, and about ten miles below Albany.

The cause has been ably and carefully discussed in all its bearings by the counsel of the respective parties, and every criticism upon the proofs, calculated to present them in their just bearings and effects, has been applied to them. After a careful reperusal of the testimony and study of the arguments, I think the weight of evidence is, that the Commerce did no wrongful act tending to the injury inflicted, and that the towed and injured boat, Isabella, was out of her place at the time, and in the track the Commerce was

entitled to pursue, and that no warning or caution was given the Commerce, which fastens upon her the liability for the loss sustained by the libellants. No principle of law came in controversy in the case determining the rights of either party, and it does not appear to me necessary to set out *in extenso* the collation and review of the testimony of different witnesses, to the facts or the reasons influencing the court to adopt the one representation in preference to that of the other.

I shall accordingly dispose of the cause without a labored exhibition of the process by which my mind has been brought to the conclusion adopted.

The libel must be dismissed, with costs.

POINTS.

VII. The answer denies the negligence charged against the Commerce.

On this point, the testimony is all reconcileable by the testimony of the libellants' witness, O'Bryan. *Fol.* 106. "Propeller sheered from west to east—not a rank sheer. She was pretty straight, but going more to east."

To the same effect is the testimony of *Groesbeck*, 159; *Vendrom*, 166; *A. Wilson*, 136; *E. Blake*, 149; *C. Blake*, 151.

VIII. The answer also alleges that the collision was caused by the culpable negligence of the Isabella in each and all the following particulars:

1. She was not properly manned—that is to say, she had not men stationed, or at hand for prompt service, in case of need in such narrow work.

She had a master and three hands—a complement of men—H. B. Smith, Mullen, Bealy, and Carter. The master, Smith, was idling and thoughtless. He saw the Commerce 500 feet off, yet he was alone on deck. He did not call his men, Mullen and Bealy, who were in the cabin. Carter was on the Cleaveland, midships, sitting on the rail, and he sent him aft on that boat. *Smith*, 118.

Tow-boats should always have persons on board to steer. *O'Bryan*, 103.

And see references under point 10.

2. She had no proper look-out. *Fol.* 69.

Carter, the alleged look-out, was in the Cleaveland, midships, sitting on the rail, till the captain sent him aft; and he went aft, looking backwards instead of forwards.

3. She had no proper helmsman. *Fol.* 69.

She had no one at the helm; her helm was lashed. 114. The captain was forward on the bow-deck. *Smith*, 113. Carter was aft on the Cleaveland. *Smith*, 117. The other two men were in the cabin. 118, 120.

4. She was improperly managed. *Fol.* 69.

There was grumbling that night about the manner in which the two boats astern were steered. Heard one of his men say they kept swinging about. *O'Bryan*, 107.

With a high deck load. *Smith*, 116. The wind blowing from the southeast a good breeze. *Ensign, page* 49. And a flood tide, (*ibid,*) without strict care she would swing about and drift constantly to the westward.

And see references under point 1 *and point* 10.

5. She carried light improperly—which she should not carry, unless at anchor—which would be likely to mislead, and which did actually mislead the Commerce, and caused the collision. *Fol.* 69, 74.

It is not proper for a tow to carry light, as the Isabella did. *Groesbeck*, 161; *T. Wilson*, 142; *A. Wilson*, 132; *Ostrom*, 176–7 *Hilligan*, 174; *Miller*, 175; *Baily*, 178; *Van Orsdall*, 179.

6. She was part of a tow which was badly made up; was too large, negligently arranged and managed. *Fol.* 70.

The tow was badly made up, in having this boat at the end of a hawser, more than one-sixth of a mile long, in a dark night—ten boats, besides the steamer—they were arranged as badly as it was possible to arrange them.

7. She was at too great a distance from the steamer. 71.

The hawser towing the Isabella was 150 fathoms long. Considered it very long. *A. Wilson*, 136. Did not see the Indiana stop; it was dark, and she was too far. *Lenox*, 170. Did not see the man on the Isabella, but saw the light distinctly. *Hale*, 95. Did not see a man on the Cleaveland; and does not think it light enough to see one there. *Blake*, 148.

8. She was out of her proper place. *Fol.* 71.

Had the tows been in the wake of the Indiana, the Commerce would have cleared them. *Sailor*, 173. The light was west of the Tacony's flag-staff. *Sailor*, 172. A considerable distance west of second tow. *Vendrom*, 166; *Chas. Blake*, 151. So that the hawser was clear of the four boats. *E. Blake*, 148. From the Oregon, it opened west of the propeller. *T. Wilson*, 141. Hanging out, way to the west of the channel. *A. Wilson*, 132. The light was seen off the starboard bow of the Oregon. *T. Wilson*, 145. Saw it out of larboard window of the Indiana. *Van Orsdall*, 179. Thought the tow had gone ashore. *Van Orsdall*, 180.

9. She ran into the Commerce. *Fol.* 73.

The Commerce was backing her engine, and had checked her way.

Moody, 146. Her original speed being only 4½ miles. *Groesbeck*, 161. The Isabella was going forward and eastward across the bows of the Commerce; she struck first the larboard bow of the Tacony, and glanced on to the Commerce. *Sailor*, 174. The Cleaveland was heading off east. *Ostrom*, 99.

10. They failed to give that attention and care which was their duty while navigating so narrow a portion of the river. *Fol.* 76.

They knew it was narrow work, for they had been transferred from alongside the Indiana to the end of a long hawser, at Athens, because they were coming to narrow work. *Fol.* 89.

If the helm of the Isabella and Cleaveland had been put hard-a-port when they first saw the propeller, the collision would have been avoided. *H. B. Smith, fol.* 115.

In a narrow channel, generally have a man stationed at the helm of each, to steer as directed. With a man at helm of each, these boats could be steered clear off to eastward the width of the channel. *A. Wilson*, 153.

It is customary, in narrow parts of the river, to have men stationed at helms of tows. With that length of hawser the steamboats might have been sheered ashore, if they had way enough through the water. *T. Wilson*, 145. Would have better control of boat, in narrow navigation, with a man at her helm to obey orders, than by lashing her helm, and depending upon a barge to steer her. *T. Wilson*, 146.

There ought to be a man at the helm of everyboat for working in narrow places. If helms of Cleaveland and Isabella were put hard-a-port, they would have sheered enough east to have avoided the propeller. *E. Blake*, 149. Generally, in his experience, a man is placed at helm of each boat in narrow work. Had both these boats put their helms hard-a-port, might have kept clear of propeller. *C. Blake*, 152.

Every tow, in such a place, ought to have a man at the helm. Thinks if the helm of each boat had been put hard-a-port, she would have gone clear; a sheer of six feet would have been enough to do it. *Groesbeck*, 161.

In a narrow place, like that in question, it is not prudent navigation to go with helm lashed. It ought to be manned. *Miller*, 176.

The master of the Cleaveland says he sung out to man on the Isabella to put his helm hard-a-port, to try and clear propeller. *Baily, fol.* 124. But there was no man, and no helm. The man was away, and the helm was lashed.

IX. These acts of negligence on the part of the Isabella were the culpable cause of the collision, and the decree of the district court should be affirmed for that reason.

It should also be affirmed, because the libellant has failed to show, by the preponderance of testimony, that the culpable negligence alleged against the Commerce existed, or caused the collision.

X. If, however, the court should be of the opinion that the Commerce was in fault, then there should be an apportionment.

THE DAMAGES.

XI. The court below erred in the rule and the evidence of damages.

1. The libellants in this case were not entitled to recover anything but the proper damages to the canal-boat. The cargo was not theirs, and they were not responsible for it, and they did not claim for it in their libel, yet the commissioner reported, and the court allowed $\$983\frac{53}{100}$ for the injury to the boat, and $\$10{,}539\frac{19}{100}$ for injury to the cargo. Pages 82, 84.

2. The commission reported, and the court allowed several thousand dollars for sums paid by the libellants voluntarily—since the commencement of this suit—without suit, or without proof of the amount of the loss, for goods alleged by their owners to have

been lost or damaged. The claimants have been deprived of all right of trial as to most of the damages.

3. The libellants failed to notify the claimants of any of their proceedings as to boat or cargo. They allowed the boat to lie in the water till she was knocked to pieces by passing boats; and then, without giving us an opportunity to look at the condition of boat or cargo, they made a new boat of her, and sold or threw away or delivered the cargo, and paid as they pleased, and make their mere payments evidence of what we must pay. It is apparent that such a rule of damages is destructive to the rights of the claimants. The owners of the cargo were the real parties in interest, and were bound to institute their suits, and give us an opportunity to defend.

JURISDICTION.

XII. The district court has not jurisdiction of the case.

1. The collision occurred within the Northern District of New York.

It happened about ten miles below Albany, in the Hudson river, at the head of Mull island. The northern district embraces the whole of the counties of Albany and Rensselaer, which extend several miles further down—the middle of the river being the common boundary between these counties, till it enters the counties of Greene and Columbia.

Act of Congress of 1818, chap. 32, § 3; 3 Statutes at Large, 414, § 3; 3 Rev. Stat. of N. Y., 3d edit., 6, §§ 16, 17.

2. The district courts have jurisdiction only of cases arising in their respective districts, and on the high seas.

Judiciary Act, § 9; 1 Statutes at Large, 76, § 9; Act of 1818, chap. 32; 3 Statutes at Large, 414, §§ 4 and 5.

3. Under the more recent decisions of this court, the case is not within the jurisdiction of the admiralty.

(*a.*) The collision was in the county of Albany or the county of Rensselaer—as the court shall find it to the east or west of the middle of the channel, which is the boundary between those counties.

(*b.*) It was *infra fauces terræ*—more than 120 miles within the State of New York, in the narrow part of the river; both sides of which for all that distance are within that State.

(*c.*) The place was not sea, but land covered with water.

(*d.*) The vessels were not proved, nor alleged to be engaged in commerce with foreign nations, between the several States, nor with the Indian tribes; and the burden was upon the libellants to allege and prove facts to sustain the jurisdiction.

E. C. BENEDICT,
Advocate for Claimants.

Supreme Court of the United States,

DECEMBER TERM, 1861.

Henry Fitzhugh and others,

Libellants & Appellees,

vs.

The Propeller Commerce, The Commerce Transportation Company, Claimants,

Appellants.

BRIEF AND POINTS.

A. P. GRANT, of Counsel,
for Libellants.

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SUPREME COURT.—UNITED STATES.

Henry Fitzhugh, DeWitt C. Littlejohn & James Peck, Libellants, *Appellees*, *vs.* The Propeller Commerce. The Commercial Transportation Company, Claimants, *Appellants*.	In Admiralty.

This suit was commenced by libel, to recover the damages sustained by a collision on the Hudson River, New-York, near Castleton, about ten miles below Albany, during the night of the 20th of August, 1852, wherein the Propeller Commerce ran into and sunk the Canal Boat Isabella, the property of the Libellants, loaded with merchandise and bound for Albany, while attached to the tow of the steamer Indiana.

Statement of the case as claimed on the part of the Libellants.

The Indiana was a steamer of more than 300 tons' burthen, drawing 5½ feet of water. She left New-York on the 19th of August, 1852, with a tow of seven boats, consisting of canal boats and barges; but at Athens she re-arranged her tow to make it narrower for the channel above, and after making this alteration, she had a barge on either side of her, with two barges tailed directly behind; then four canal boats to a hawser, and in rear of these were a canal boat and barge attached by another hawser, which was some 90 or 100 fathoms long. (Fol. 83.)

This last tow was made up of the canal boat Isabella and the barge Cleveland, each one being loaded, and they being the only boats in the tow which were loaded.

The former was on the larboard and the latter on the starboard hand.

The Cleveland had the hawser, and the canal boat was fastened to her side by fore and aft lines and spring lines amidships.

The entire tow had just passed Mull Island, where the course of the channel is about N. E. & S. W. and were straightening up, above the point of the island, when they discovered the propeller coming down.

The course of the Indiana, on straightening up, necessarily became more to the west.

The channel of the river at that point (fol. 86) was 400 to 600 feet wide, while the entire surface of the river was half a mile wide.

The tow was properly and judiciously arranged; the Indiana and each boat attached were staunch and in good sailing and sea-worthy condition, and each boat had a full compliment of men, competent to their respective positions, and who were on duty.

The night was still, clear and pleasant, so that objects were distinctly visible on land.

There was no storm, sea or wind to interrupt the safe navigation of the river.

The Indiana was sailing at her usual speed, necessarily very slow, up the river and against the current, and on discovering the approaching vessel, she ported her helm and went as near the east shore as she safely could go, so as to allow a good berth to the propeller on her larboard side.

There was sufficient depth of water and an abundance of room on her west side to allow of the safe passage of the propeller without a collision, where it was supposed she intended to go, and the propeller would have passed the entire tow in safety had she continued on the course she was then on.

She passed the Indiana some 70 *to* 100 *feet* to the west, *with a schooner between them under full way, having her sails up and her boom out.* (Fol. 84.)

The lights of the propeller were seen a mile or more off; (fol. 104,) the Oregon, which was just in rear of the propeller, saw our lights a mile off, (Ensign's 17th answer) and as the propeller had just as good an opportunity for observation, we claim that she saw our lights at least at the same distance.

She passed 50 or 60 feet (fol. 91) west of the two barges tailed to a hawser in front of the last tow, and had she continued on her then course she would have passed at least at the same distance to the west of the Isabella.

The channel, at the river here, was nearly north and south, and well over to the west side of the river—and running down some ways to the west of the place occupied by the last tow, so that the last tow was some distance east of the centre of the channel.

After passing the last tow of canal boats, the propeller took a rank sheer to the east, running nearly across the river, and without slowing her engine or even slacking her speed or again changing her course she ran down and sunk the Isabella.

There was no necessity for such a change of her course, and we insist that no reasonable excuse can be offered for it.

The fact that the Isabella was struck upon her bow and forced between the bows of the propeller and her tow, the Tacony, demonstrates that the propeller was far out of her course; had passed to the east side of the channel and was attempting to cross the hawser and pass the last tow on its starboard side.

The witnesses agree in the expression that this is a narrow channel, and that it required more than ordinary care for its safe navigation.

If for want of depth of water, or sufficient room, or for any other good cause its navigation was difficult or dangerous, then the propeller should have advanced with great caution, should have slowed her engine and carefully have felt her way, and if necessary, in order to avoid a collision, she should have stopped her machinery altogether. She had perfect control of her own motion, to change her course, and to move or not to move. She could have avoided the collision, and will be held responsible for all the damages her negligence has occasioned.

Either from stupidity or heedlessness, and with an entire disregard to the narrowness of the channel, or the danger she might encounter or the damages she might occasion, alike regardless of the loss of human life and property, she dashed

down among this fleet of boats, under full steam and at the top of her speed, to the great consternation of all and to the especial destruction of the Isabella and her cargo; as if mighty in her own strength, she boastingly said to the weak and helpless around her—let those who are in danger take care of themselves.

The Isabella was entirely helpless, with no power of locomotion of her own, and under a rule of navigation requiring her to follow the steamer having her in tow. Yet every effort which could be made by the Indiana and her tow, and especially by this canal boat and the Cleveland, to which she was fastened, was made to prevent the threatened catastrophe.

The Indiana could not come to without throwing her tow into confusion and increasing the danger of a collision, nor could she crowd any nearer to the east shore, but she could and did slow her engine as soon as she saw the propeller change her course and sheer towards the last tow.

The Pilot of the propeller testified, that had she gone *six feet* farther west, there would have been no collision, while the testimony in the case establishes the fact that there was both depth and width of water to a far greater distance than that on the west, which he could have occupied without touching ground or running any risk.

The proof demonstrates most conclusively that the collision was occasioned heedlessly and unnecessarily, without fault on the part of the Indiana and her tow, and wholly by the negligence and mismanagement of the propeller, and therefore she must respond for the damages she has occasioned.

The case as claimed by the claimants.

That the propeller was going down the river with a barge in tow, lashed to her starboard side. She saw our light and supposed it to be a vessel at anchor, on the west side of the river, and shoved a little to the east to pass on that side.

On discovering that it was a part of the tow of the Indiana, and was in motion, she attempted to stop and back her engine, and thus the collision occurred.

It is also claimed that the Isabella was not properly navigated, and that the disaster is chargeable to her carelessness and mismanagement, and perhaps the allegation often made may be repeated here, that she attempted to cross the propeller's bows.

We request a full and candid examination of the facts in this case, and when made we shall submit the case in entire confidence that no fault or blame is chargeable to the vessel of the libellants or to the tow, but that the disaster was occasioned by the negligence, heedlessness and carelessness of those in charge of the propeller.

Abstract of the allegations set forth in the libel:

First—That the libellants were the owners of the canal boat Isabella, which was used by them in the transportation of merchandise and freight, and regularly run between the port of New-York and the city of Oswego, by way of the Hudson River and the canals of the State of New-York.

Second—That said canal boat was tight, staunch, &c. well manned, tackled, &c. with the usual and necessary complement of officers and men, &c. who were on duty, &c.

Third—That on the 19th of August, 1852, being fully freighted with merchandise, she left New-York for Albany, in tow of the steamer Indiana, which was engaged in the business of towing boats, and was sufficiently manned and in all respects competent for such business, and had on board a full crew, &c.

Fourth—That the Isabella was properly and safely attached to a barge, which barge and said Isabella were towed by a hawser astern of said steamer, and at the usual and proper distance.

Fifth—That about 9 or 10 o'clock, in the evening of the 20th of August, 1852, the Isabella, while ascending the Hudson River, in the tow of said steamer, and when about 10 or 11 miles below Albany, was run into and sunk by the propeller Commerce, which was descending said river.

That said steamer Indiana, and all the craft in tow of her were on the east side of the channel of said river and in their

proper place, when said boat Isabella, through the negligence and inattention of those on board and having the charge of said propeller, and of their mismanagement and want of care was run into and afoul of by said propeller and sunk.

Sixth—That at the time of the collision the propeller had safely passed by the steamer Indiana and the barges attached which were ahead of the Isabella, and which were much broader on the water than the Isabella and the barge to which she was attached. That there were lights on the Indiana which were visible to those in charge of the propeller. That the night was not dark and the master of the Isabella was standing on the bow of his boat.

That after passing the Indiana and the barges in tow, the propeller sheered suddenly to the larboard, so that she moved towards the eastern side of the river, and ran against the boat Isabella, and broke all the lines by which she was attached to the barge, and opened her seams so that she sunk with her whole cargo in a few minutes.

Seventh—That such collision and damages happened solely through the mismanagement, carelessness, negligence and want of attention of those on board and having charge of said propeller, and could not have been avoided or prevented by those on board of either the Isabella or the Indiana, all of whom did all in their power to avoid such collision; and that such collision and damage could not have happened had not the propeller altered the course she was on when she passed the Indiana and shoved to the larboard.

Eighth—That the Isabella was a first class boat, and fairly worth fifteen hundred dollars.

Ninth—That the cargo was worth fifteen thousand dollars, and that the entire damages amount to seventeen thousand dollars.

LIBELLANT'S POINTS,

AND REFERENCES TO TESIMONY.

I.

The Indiana, the Isabella and the Cleveland were severally staunch, sea-worthy and in good order, and the tow was well made up and properly arranged.

These positions are not denied or contradicted by the claimants.

Capt. Buckly, Master of the Indiana, fol. 87. "The Indiana was in good condition and well manned, and her tow was made up carefully and in the usual manner."

Capt. Baily, master of the Cleveland, fol. 125–6: "His boat is staunch and strong, and well conditioned for navigation."

II.

The Indiana had on board the usual lights indicating that she had boats in tow, which were burning bright and were seen a mile off.

Capt. Buckly, her master, fol. 104.

"I had a red light at stern, on a flag-staff, or else on the rail of promenade deck, three or four feet from deck, to indicate she had tows in tow. Light is so placed to be seen by vessels meeting him.

Ensign, 1st mate of the Oregon, page 48, ans. to 17th interrogatory.

"I saw the light of the steamer about a mile. I saw by her lights and her movements that she had vessels in tow."

Answer to next interrogatory:

"The propeller's crew had as good an opportunity of seeing their lights as this witness."

The last named boats were fastened by a harness 90 fathoms long. Vol. 83 - 149. 153.

Capt. P. O'Brien: "Think I saw the propeller a mile or so off." Fol. 103.

III.

Each one of the vessels constituting the tow had the usual complement of officers and men, who were competent and on duty.

Capt. Buckly, fol. 88: "He stood as far back on the promenade deck as he could get, and was on a high place where he could see the whole transaction."

"The pilot, John Van Arsdale, was at the wheel, and he was a good pilot. The steward was also in the pilot house, (fol. 89.) There were persons on the tows alongside of steamer, and two next tailed to them. (Fol. 90.)

This includes the entire tow except the Cleveland and the Isabella, attached by a separate hawser.

Capt. Smith, master of the Isabella:

"He had four men on his boat; that was a full crew for her. (Fol. 112.) One man on the lookout besides himself. (Fol. 116.) He stood on his forward or bow cabin deck. (Fol. 116.)

Captain Baily, master of the Cleveland:

"He called a man to the helm and ordered him to keep it hard-a-port. (Fol. 123.) He stood forward on the promenade deck where he could see the whole transaction. (Fol. 124.)

He saw this man at the time, (fol. 126.) Had two men on his boat besides himself—his usual complement, (fol. 125.)

Vide testimony of those in the tow.

Hale, master of Barge Adams, tailed on larboard side:

"Witness had usual complement of men on his boat." (Fol. 93.)

Van Ostram, master of barge Rathbun, on the larboard side of Indiana and ahead of the Adams.

"He was standing on the larboard bow of his boat." (Fol. 97.)

P. O'Brien, Master of barge Monteith, on starboard side of Indiana:

"He was on the upper deck." (Fol. 101.)

J. O'Brien, Master of the O'Neil, and one of the four first tailed on:

"Saw propeller coming down." (Fol. 105.)

Don't tell where stationed, but was on his boat and saw the whole transaction.

IV.

Fastening the Isabella to the Cleveland and lashing her helm half a-port was according to usage, and is justified by practical seamen as well as by some of the claimants' witnesses; the steering in such cases being done by the barge.

Capt. Van Ostram: If two boats are lashed astern, as these were, the helm of the barge would commonly be used. (Fol. 99.)

Capt. O'Brien: "When a canal boat is lashed to a barge, the helm of the latter is generally used in steering. Seldom use the helm of the other. (Fol. 102.)

Captain Smith: "Helm is usually lashed half-a-port in that way for the purpose of keeping her steady in steering, the barge being the steering vessel. (Fol. 116.)

Capt. Baily: "His boat steered well, (fol. 124.) Barge does the steering when canal boat is lashed to her. Hawser is given to the barge and then helm of canal boat is lashed half-a-port. *She was well lashed to his boat.*" (Fol. 125.)

Pilot Ensign: "If canal boat is lashed to a barge, and the barge has the steamer's hawser, the barge does the

steering. Under such circumstances it would be proper to lash the helm of the canal boat half-a-port and let the barge do the steering." Answers to 52d and 53d interrogatories.

While we avow an entire want of confidence in the claimants' witnesses, and especially in the two Wilsons, we will refer to their testimony on this point.

A. Wilson: "Witness has been a good deal in *towing*. It is usual for boats lashed as the two stern ones were, for the canal boat *to lash her helm part way as in this instance*, for the barge does the steering." (Fol. 132.)

T. M. Wilson: "*It is proper to take helm of canal boat if alongside of a barge; the steering could be done by the barge.*" (Fol. 145.)

Thus much have the Wilsons felt themselves constrain- to say, justifying and sustaining the act of the Isabella, while fastened to the Cleveland, of lashing her helm half-a-port and trusting the steering to the latter vessel; yet, as if fearful that such strong corroborative evidence might operate to the prejudice of the claimants, they have volunteered other statements, calculated, doubtless, in their opinion, to destroy its beneficial application in this case.

The testimony of T. M. Wilson, if properly considered, may not conflict in the least with our proof. He swears positively to the rule that it is proper *to take the helm of the canal boat and let the barge do the steering.* He also adds, "he *thinks* it is customary in narrow parts of the river to have men stationed at the helms of tows." This can mean no other helm than the helm of the vessel which did "the steering," because that of the canal boat was rendered useless by being fastened to the barge. At the helm of the Cleveland, was a competent man, who obeyed the captain's orders and kept it hard-a-port." (Fol. 126.)

But the pilot of the propeller also confirms this rule, and had adopted it on that very occasion. He had the barge Tacony in tow, fastened on his starboard side, *the helm of which was useless by being lashed to the propeller.*

Groesbeck "judges that the helm of the barge fastened to his propeller was lashed that night from the steering of his boat. (Fol. 162.)

Sailor, master of the Tacony, which was fastened to the propeller: "His helm was lashed four spokes a-starboard that night." (Fol. 173.)

V.

The Indiana, observing the rule of navigation, kept to the right with her tow, and went as near the eastern shore with it as she could go in safety.

Capt. Buckly: "The Indiana was so well to the eastward that he gave orders to go no further east; was afraid should strike ground if they went further east." (Fol. 83.)

Capt. Van Ostram: "Thinks Indiana and her tow were as far east as was prudent for her to go." (Fol. 97.)

Pilot Ensign: "I think the Isabella, at the time of the collision was a little to the eastward of the centre of the channel of the river." 37th answer, page 50.

"The Indiana and her tow, at the time the propeller passed her, were on the east side of the centre of the channel." 41st answer.

The claimants' witness, Van Arsdale: "Indiana was pretty well to eastward; might have gone little further east. *Was east side of the channel.* (Fol. 179.)

VI.

The Isabella and Cleveland were in their proper place, in line with the remainder of the tow, and did not change their course after the propeller passed the Indiana. The Cleve-

land drew more water than the Indiana, was heavily loaded and could not go as near the shore.

Ensign: "The last tow did not change its course from the time the propeller passed the Indiana until the collision, that I could perceive." 36th answer.

"The Indiana and her tow, at the time the propeller passed the former, were on the east side of the centre of the channel." 41st answer.

Capt. Buckly—"Cleveland drew 6½ or 7 feet water—was pretty well loaded." (Fol. 84.)

"Indiana over 300 tons' burthen; draws 5½ feet water." (Fol. 88.)

"Thinks the two boats in tow astern, (barge and canal boat) were about in line with steamer." (Fol. 83.)

"Thinks barge and canal boat were *east of middle of channel.* They could not have gone great deal further east with safety. (Fol. 86.)

Capt. Hale: His boat was well in east, as he thought, and *stern tow* was about *in range with his boat.* Heard Capt. Buckly call out he was afraid to go further east lest he should get on shore." (Fol. 91.)

"Barge and canal boat had just begun to straighten up to eastward, and were working *in line with steamer* when propeller passed him." (Fol. 95.)

"He thought the last tow were in line with his boat and as far east.

"Thinks the Isabella was about in middle of channel, perhaps a little east of it." (Fol. 96.)

Van Ostram: "Thinks the Indiana and her tow were as far east as it was prudent for her to go. Should think the two stern boats then were very near the east side of the channel, which he supposed was 300 or 400 feet wide." (Fol. 97–8.)

Capt. P. O'Brien: "Judges that Indiana and her tows were well over *on the east side of the channel—as far over as was safe—east of the centre of the channel.* I could see Isabella and Cleveland." (Fol. 101.)

Capt. J. O'Brien: "The boats in tow with which he was were well over to east." (Fol. 105.)

Smith, steward of Indiana: "Steamer and her tow were *east* of the *middle of the channel.* Knows steamer was. Went aft; was drawn there by ringing of bells of steamer; *stern boats were then in range with steamer* and east of centre of channel." (Fols. 108–9.)

Capt. Baily: "Thinks he was east of middle of channel; *not west of it.* He stood forward on the promenade deck where he could see the whole transaction. His boat drew 6 feet 10 inches that trip." (Fol. 124.)

It may be urged that the claimants' witnesses contradict our proof upon this point; but when their testimony is closely examined, and their motives and opportunities for observation are properly understood, we insist that it does not invalidate or impeach our position in the slightest degree.

Some of their witnesses successfully impeach themselves; others are positively and flatly contradicted by facts, circumstances and testimony, while none of them were in a good position or near enough to the Isabella to see the transaction.

Alexander Wilson seems determined to render himself conspicuous as the champion of the claimants, and appeared very ambitious of rendering them signal service. He succeeded in making irreconcilable and contradictory statements, and showing himself to be unworthy of confidence.

He intended to have it understood that he was the pilot at the wheel of the Oregon, and virtually in command; and that when the collision between the propeller and the Isabella was occurring, he rang the bell of the Oregon; whereas, in truth, it was not his watch, and he was not on duty; he had no right to ring the bell, and did not do so or offer to do so. He was only the 2d pilot, and was wasting the time before turning in by lounging about the deck and wheel-house. Lewis Ensign was the 1st pilot; it was his watch and he was on duty, in com-

mand, and he rang the only bells that were rung on the Oregon that night.

Wilson did not see the last tow at all "till he got alongside of the four boats above them," and these tows were only 50 fathoms apart. The distance between the Oregon and the Isabella at that time was not much more than the length of the former, and if she was running at the speed he represented, it would require but a moment of time to run down to her. He says the speed of the Oregon was four times that of the propeller.

The average speed of propellers, going light, and down the river, is 10 miles an hour; but reduce that of the Commerce to 4½ miles, and if the Oregon was running four times as fast, we have her speed established at 18 miles an hour, or nearly two miles in three minutes. Therefore, while she was running 150 or 200 feet it would seem impossible that Wilson could have made so many changes as he represents.

Let us see how much she accomplished in that time if Wilson is to be believed.

At fol. 130 he says: "When he first saw a light on the two stern tows, (which was when he was alongside of the four boats just above,) he thought it a vessel at anchor, and *headed to go east of them.*" This change, with his speed, would soon have put him across and on the east side of the river, and he certainly could not have got there without crossing the hawser of or running into the last tow.

"He was then alongside of the four boats. Propeller was then directly ahead of him; he came up and lapped on her starboard quarter."

How was it possible for him to get upon the starboard quarter of propeller, on her west side, after having departed from the course he was on by heading *to the east* a few moments before. Heading to the east, if it did not direct his vessel entirely from the course of the propeller, must certainly have brought her upon the propeller's *lar-*

board side. If the propeller turned with her, the same way at the same time, then with corresponding speeds they would have held their relative bearings towards each other, and both vessels would have crossed our hawser or have run into our tow.

"But he found there was not room to pass her on that side, and stopped and headed to east of propeller." This was of course after he had attempted to pass on the east side. "As he got lapped on that side propeller rang four bells, add then witness rang his bells and went back, supposing something was the matter." (Fol. 131.)

The impossibility of such manœuvres, in consequence of the speed of the Oregon and the short distance between her and our own tow is glaringly apparent without referring to the testimony of the pilot Ensign, who then had charge of the Oregon, and contradicts in toto this statement. When the Oregon "was alongside of the four boats, the propeller was then directly ahead of him." Suppose the propeller was only 25 to 50 feet "ahead of him," which was as near as safety would allow her to run, then the propeller had only 100 or 125 feet to go to make the distance given by Wilson, and this distance was all the time being reduced by the upward sailing of the tow. However sluggish may have been the speed of the propeller and the tow, it is preposterous to allege that the Oregon could have lapped alternately on each side of the propeller, stopped twice to enable her to pass out of the way, and made two distinct and different changes in her course, in the distance of 50 fathoms, and then the collision occurred, and what is equally irreconcilable, that she herself avoided a collision.

Again, fol. 131, he says, "Heard boat strike; they were directly under his bows, but so dark he could not exactly see them."

If he lapped first on the starboard and then on the larboard quarter of propeller, of course the Isabella would have been "directly under his bows," and it would have been impossible that he should have avoided running her down.

Again, fol. 134, he says. "Oregon was close on to the propeller, on her starboard quarter when she took a turn eastward, and within a minute or two propeller struck the tow; witness had only time to back off and get on the other quarter before she hit; he passed down west of her."

Here he represents that he was on the starboard quarter when the collision occurred, or at most that it occurred within "a minute or two." But in the next sentence he swears "he had only time to back off and get on the other quarter before she hit."

Why did he wish to "get on the other quarter?" on the very quarter where these vessels were then approaching each other in collision. Where his vessel then was there could be no danger, if actually on the starboard and west side; but if the Commerce was then running directly into the Isabella, why should he desire to pass to the larboard and east side when he must have encountered imminent danger; and if he did do so, how could he have avoided involving all three vessels in one collision, and when did he again reverse his course so as to be able to "pass down west of the propeller?"

This entire statement is a sheer fabrication without even the merit of the plausibility of truth. Ensign, the pilot on duty and in command, exposes its falsehood. Vide his answers to 5th, 13th, 14th, 15th, 39th and 40th interrogatories. Wilson swears flippantly and endeavored to speak with an air of authority; that we were not following the Indiana, &c. as though he saw our tow and her location, and in the same breath admits "he heard boat strike; they were directly under his bows *but so dark could not exactly see them.*"

If while so near the Isabella when "*directly under his bows,*" he could not see her *because it was so dark*, how could he tell where she was when at a still greater distance off?

The two Blakes, father and son, who were on the same boat, also testify on this point, although the father had

been on the river 30 years and his son 7 or 8 years, yet it does not appear that either of them ever reached a higher position than a deck hand. The old man, E. Blake, states positively that *the tow was on east side of the channel* when propeller passed them." (Fol. 147.) Subsequently he says, "*calculates* Isabella was opposite the point, at the time of the collision, to west of him, and not directly following the steamer." C. Blake, the son, says, "his boat was straight up behind Indiana; a short distance above head of Mull Island saw collision; Isabella and Cleveland were then west of her and not following behind his boat." (Fol. 151.)

If this is so, it is accounted for in the fact that the Indiana had been straightening up her tow and those in the rear may not have been in exact range with the forward tows, although as far east as they could safely go."

Sailor, fol. 172, "saw the wake of 2d tow and Indiana, and *judged* the stern tow was 100 feet west of that."

He don't even claim that he saw the boats in the last tow at all, but in a night which Wilson swears was so dark that he could not see the Isabella when she was "directly under his bows," this witness could see the wake of the 2d tow, and *judged* from this that the last tow were not following directly behind.

Sailor was on the barge Tacony, which was attached to the starboard side of the propeller, and how was it possible for him to have seen the wake of the 2d tow, even in a clear night, while far west of it as he pretends, unless it was at the time the propeller made a rank sheer to the eastward, bringing him in rear of the 2d tow and of necessity in collision with the Isabella.

VII.

The Indiana was slowed, and every reasonable precaution taken by the Isabella and the Cleveland to avoid the collision.

Capt. Buckly: "Capt. Hale called out to him that propeller would run unto Isabella and Cleveland. Witness said he could not help it, *he had slowed his boat.*" (Fol. 85.)

This was before the collision and when Capt. Hale saw that it was inevitable.

"Witness then had his finger on the bell rope, and pulled it to stop her. (Fol. 85.) Rang to slow as soon as he saw Commerce take a sheer." (Fol 89.)

Capt. Hale: "Heard Capt. Buckly call out he was afraid to go farther east lest he should get on shore." (Fol. 91.)

"Witness called out to Capt. Buckly, who was standing astern of his steamer, that as the propeller was going she would strike the two tows astern." (Fol. 92.)

"Capt. Buckly replied he could not help it, he had stopped the steamer." (Fol. 92.)

Capt. Smith: "Was about 300 feet off when propeller began sheering towards her; was then fearful she would strike him, and *hailed her as loud as he could* to sheer westward or would be into him. Struck him in a very short time after she took the sheer towards him. *Capt. of the Cleveland sung out to his men to port helm.* He also sung out to the propeller in loud voice in about same words witness used." (Fol. 111–112.)

"Tried to loose his lines, but could not." (Fol. 116.)

"Carter (his lookout) was sitting on rail of Cleveland when witness sent him aft to loose line. It was more convenient for him to go aft on Cleveland than on Isabella to do it." (Fol. 117.)

Capt Baily: "Witness called a man to the helm and ordered him to keep it hard-a-port, and witness ran forward and hailed propeller to keep off to westward or they would come into them." (Fol. 123.)

"Rule was to follow steamboat towing him. His boat steered well." (Fol. 124.)

"The man he called to helm was forward at time. Saw him at that time. Same man had it previous to witness. Observed man he called to helm; he *obeyed his orders and kept it hard-a-port.*"

VIII.

The propeller passed the Indiana on her larboard side, about 100 feet distant, on a course about S. W. or W. of S. with a schooner going up under sail, having her boom out, between them.

Capt. Buckly: "Commerce passed 70 to 100 feet to west; a schooner was then between her and Commerce going up; wind southward and her boom out." (Fol. 84.)

Capt. Hale: "When propeller was abreast of Indiana, there was a schooner bound up between her and Indiana; then probably 80 or 100 feet between the two steamers." (Fol. 91.)

Capt. Van Ostram: "When propeller was abreast of him, a vessel west of him, between him and propeller. Thinks propeller then over 100 feet west of him, between him and propeller." (Fol. 97.)

"When she took the sheer she headed S. E. or E. of south." (Fol. 98.)

The maps, the course of the channel, and her own course after she sheered, shows that the propeller, previous thereto, was on a course S. W. or W. of S. and establishes the truth of the testimony that "the propeller made a rank sheer to the eastward."

Capt. O'Brien: Propeller passed west of Indiana. Thinks over 100 feet." (Fol. 102.)

"*Saw Oregon pass* 200 *or* 300 *feet west of Indiana,* about same time with propeller." (Fol. 103.)

Ensign, in his 19th and 20th answers, A. Wilson, at Fol. 137, T. M. Wilson, fol. 143 and Groesbeck, fol. 162, each testify to the vessel being between the two steamers.

IX.

The course of the channel was S. W. and N. E. and its width from 300 to 600 feet. Without any necessity or excuse, the propeller after passing the Indiana and her first tow, made a rank sheer to the eastward, in a direct line for the Isabella, and without again changing her course, ran down and sunk her under full headway.

A. Wilson: "Channel was S. W. and N. E." (Fol. 138.)

Groesbeck: "Channel was about S. W. and N. E." (Fol. 164.)

The maps corroborate this course, and there is no contradictory evidence.

Capt. Buckley: "Channel 400 to 600 feet wide at place of collision, and river half a mile wide." (Fol. 86.)

"After propeller passed first tow she took a sheer to eastward. (Fol. 85.)

"Propeller made a considerable sheer in hitting her." (Fol. 85.)

"She might have sheered in 50 or 100 feet." (Fol. 87.)

Capt. Hale: "The Commerce, just after passing his boat, took quite a sheer into the eastward." (Fol. 92.")

Capt. Van Ostram: "Saw propeller change her course and heading to east. 3-98

"*She held that course to the collision*, as far as he saw, *and he kept his eyes on her because he expected a collision.*" (Fol. 98–9.)

Capt. O'Brien: "Propeller changed her course just before passing John Adams: (John Adams was on larboard side of the four boats ahead of last tow;) near across the river and for the tow astern, what he called a *pretty rank sheer.*"

She held her course, in his opinion, *till she struck the Isabella*. Observed her course, because, from her course *saw she must run into the stern tow. Watched her till she struck.*" (Fol. 102.)

[Can there be a question that she did not continue under full headway till she struck the Isabella?]

Capt. J. O'Brien: "Propeller sheered from west to east when he first saw her." Fol. 106.)

Capt. Smith: "Saw propeller approaching take a sheer towards him. (Fol. 111.) Struck him in a very short time after she took the sheer towards him." (Fol. 112)

"When he hailed propeller she was then standing towards him. Did not notice that she changed her direction after that. (Fol. 113.) First he saw of sheer in of propeller, when she was against 2d tier of boats."

Capt. Baily: "After the propeller got by the Indiana, she took a sheer east; *a pretty rank one* he thought, *running pretty well across the river.* She kept directly on the course to which she had steered."

"Did not see that propeller minded the hails at all. Held directly on her course." (Fol. 123.)

Ensign: "After propeller passed the Indiana she changed her course and put off about two points to the eastward.

I was looking at her when she made this change.

I saw the last tow of the Indiana. I supposed the propeller would run into it. I made the remark to my wheelsman that the propeller would run afoul of the stern tow.

I could not perceive any alteration in the propeller's course after it was changed to the eastward, until she struck the Isabella.

I heard her bells and it was but a few moments before I heard the crash of the collision."

Answers to to 28th, 29th, 30th, 31st and 32d interrogatories.

The last tow did not change its course from the time

the propeller passed the Indiana until the collision, that I could perceive. 36th answer.

The claimants' witnesses establish the fact that the propeller, when about abreast of the 2d tow, made a sheer to the eastward.

A. Wilson: "Oregon was on the starboard quarter of propeller, when the latter took a turn eastward, *and in a moment or two propeller struck the tow.*" (Fol. 134.)

T. M. Wilson: "Oregon about straight down the river when met the Indiana; propeller same, *but varied her course little east in passing.*" (Fol. 142.)

E. Blake: "Just as propeller passed him (in last tow) she took a little sheer eastward." (Fol. 149.)

"Propeller sheered very little to eastward after passing his tows." (Fol. 150.)

C. Blake: "Saw propeller, as she passed him, bear off rather eastward." (Fol. 151.)

"Propeller shoved to eastward just as she got a little by his boat." (Fol. 132–3.)

Groesbeck: "When abreast of 2d tow turned his wheel over about two spokes a-starboard." (Fol. 159.)

Van Drom: "Pilot had hove his wheel little starboard." (Fol. 166.)

Sailor: "Propeller changed her course little to the eastward, about when she was abreast of 2d tow, or at their sterns." (Fol. 172.)

That the propeller changed her course in a direction which must inevitably, if pursued, have brought her in contact with the last tow, is established beyond all contradiction, and we now propose to show that she continued on that course under full headway.

Capt. Hale: "Saw her sheer into eastward, and in a very short time the collision occurred. (Fol. 92.)

"Thinks *propeller passed him under full way.*" (Fol. 97.)

As the propeller passed him under full headway, and

the collision occurred almost immediately, or in his language, "in a short time," he, constantly watching her, would have noticed so important a matter as the slowing her speed, had it been done.

Ensign, answer 31 and 32.

Van Ostram: "She held that course, (S. E. or E. of S.) to the collision, as far as he saw, and he kept his eye on her because he expected a collision, and thought the Cleveland was heading off east to keep clear of her. Collision was very soon afterwards." (Fol. 98–9.)

"Don't recollect of seeing any change in her speed, or seeing her stop before the collision." (Fol. 101.)

J. O'Brien: "Heard bells ring, 3 or 4, as propeller was about striking Isabella." (Fol. 107.)

Not even an order to slow or stop the machinery could have been given until about the moment the crash was occurring. The bells responded to this order, and they were not rung until at the time the "propeller was about striking the Isabella."

It will not be claimed that the machinery was stopped without orders, or before the ringing of the bells.

Capt. Smith: "Can't say whether propeller *attempted to stop; saw no attempt; came together with a good force.*" (Fol. 112.)

The force of the blow as well as the short time occupied by the propeller in running down the Isabella after changing her course, furnishes very decided evidence that she continued under full headway till she struck.

Capt. Baily: "Did not see that propeller stopped at all till the collision; remarked upon it afterwards. Stood forward on promenade deck where he could see whole transaction." (Fol. 124.)

Not only, as we insist, where he could see but where he did see the whole transaction.

"His attention was particularly directed to her because he expected a collision." (Fol. 125.)

The claimants' proof, when well considered, does not contradict our position, but furnishes confirmatory evidence that no measures were taken to slow the speed of the propeller, until the danger became so imminent that the changing of the helm either way, or shutting off the steam, or even an attempt to back her, could not have avoided the collision, or materially have reduced the force of the blow. Nothing was attempted until just at the moment the vessels came together—too late to effect the result in the slightest degree.

A. Wilson: "I was on the starboard quarter of propeller when she took a turn eastward, and *within a minute or two propeller struck the tow.*" (Fol. 134.)

Showing beyond dispute, that after the propeller made the sheer eastward, when opposite the 2d tow, she neither changed her course nor lessened her speed until she run into the Isabella.

Wilson confirms this fact, saying (same folio) he "thinks they struck about the time the bells had done ringing; *had not time to back.*"

Of course, while under full steam, and at the moment of striking an object, a steamer could not be slowed—much less be able to go backwards.

T. M. Wilson does the claimants no service on this point.

"Bells rang immediately—might say almost same instant as it was discovered what the light was—to slow, to stop and to back, and then the collision took place." (Fol. 139.)

If this testimony of the two Wilsons is worthy of any consideration, it establishes the fact that the ringing of the bells and what effort was made to slow the motion of the propeller and the collision was simultaneous.

The idea that they were misled by our light is the merest pretence; an entire fabrication, put forth to excuse and justify their negligence. Well might we pause here and inquire why the propeller's crew neglected thus

long the necessary precautions to guard against collision, which, to every observer, must have appeared to be inevitable. In charity to them it might be answered, that they never saw our boat or its light until they were directly upon us.

Where was their crew and who were on watch? Out of some 15 or 20 men, which we suppose such a steamer would require, we have no proof that more than three of them were on duty, two of whom were in or very near the wheel house.

Groesbeck, the pilot, was at the wheel, and had other duties to perform than those of a lookout. He says, Fol. 162:

"Van Drom was at pilot house, by witness, standing at corner of door."

If Van Drom was on duty as a lookout, he was incompetent to discharge the duties incident to his position, or the necessary steps to avoid the difficulty which occurred would not have been so long delayed. Moody was in the engine room. But where were the rest of the crew? This was a question the claimant was called upon to answer, and if these were the only persons of the crew who were up and on duty, then there was manifest fault in this particular.

Moody, the engineer, apparently apologizing for the absence of the captain, says: "He was in the boat that night; does not know in what part he was at time."—(Fol. 146.)

Capt. Lennox, speaking of himself says: He was in his room lying down; his watch was below at time of collision." (Fol. 168.) On this account he had turned in.

Moody: "Four bells rung in quick succession, to slow, to stop, and back. Made 10 or 12 turns back before the blow; *they would check her way some but not much.*" (Fol. 146.)

With all the feeling he manifested and his natural anxiety to save his own boat, he was forced to state facts showing the propeller to have been under full motion at

the time of the collision. He states positively that efforts to turn the wheel "did not slack her headway much."

Groesbeck, the pilot, who was at the wheel, and doubtless felt as though the responsibility of this disaster was upon his shoulders—with all the coloring he gave his evidence, was also compelled to state, while speaking of the effort to stop his boat and its effect, that he "*does not think that the way of propeller was stopped much.* Does not think she backed over ~~45~~ 10 seconds!!!" f 156

"Discovered that light was not on anchored vessel when propeller passed 2d tier of tow." f 157

The proof on both sides establish the fact that as he passed the 2d tow he sheered to the east."

If he is to be believed that he knew the light he saw was upon a tow attached to the Indiana when he passed the 2d tow, and then immediately changed his course towards that light, and ran down our boat, he confesses his negligence and carelessness, and his responsibility for all the damages that his heedlessness occasioned.

"Should not think it more than 20 seconds after he rang to back before the collision."

It might almost be suspected that he intended to convey the idea that his boat did not slow her speed until she came in contact with the Isabella, or about that moment.

Capt. Lennox: "Was in his room lying down; his watch was below; first he heard was orders to stop and back the boat, and immediately went on deck; boats struck within 10 seconds!!!"

We have already shown from claimants' witnesses that the ringing of the bells and the collision were simultaneous. Hence we think Capt. Lenox could have seen no part of this transaction until the crash had occurred.

He must have required the *ten seconds* he mentions, to have got out of bed and out on deck.

Van Arsdale: "When the bell rang to stop he looked out and saw the tow out of larboard window; vessels *altogether then.*" (Fol. 179.)

As the steamer was straightening up to the west, this witness could have looked out of no other window and been able to see the tow, but his evidence establishes the fact that the ringing of the bells and the collision were at the same time, and consequently the truth of this Point, that the propeller was under full headway when the vessels came together.

We submit, with great confidence, whether we might not reject the libellants' proof on this point altogether, and from the claimants find it strongly and fully sustained. Every one of their witnesses are compelled to admit the sheer—that but a few moments of time elapsed before the crash; and that as the bells rang "then the collision took place."

X.

The propeller was hailed from the Isabella and the Cleveland, and heard the hailing, but made no reply and adopted no measures to avert the threatening catastrophe until the instant it was occurring.

Capt. Hale: "Heard halloaing below; could not say whether from propeller or tows." (Fol. 93.)

Capt. Smith: "Was fearful she would strike him, and *hailed her as loud as he could* to sheer westward or would be into him." (Fols. 111–12.)

"Capt. of Cleveland also sung out to propeller in loud voice, in about same words witness used." (Fol. 112.)

"Heard no answer from propeller to his hail." (Fol. 116.)

Capt. Baily: "Hailed propeller to keep off to westward or they would come into them." 123

"Called out in as loud a voice as he could, twice or three times." id

"A man from Isabella had hailed twice previously in a loud voice." id

"Did not see that propeller minded the hail at all; held directly on her course." (Fol. 123.)

Heard no reply from propeller to hail. (Fol. 125.)

The claimants' witnesses admit they heard our hailing.

Groesbeck: "Heard some one halloa at about time of collision—*before actual striking*—but could not tell where from or what was said." (Fol. 163.)

Van Drom: "Heard a hail from one of these two tow boats 2 or 3 seconds before collision."

Our theory is that these two men, Groesbeck and Van Drom, are the only persons who were on deck; that they wholly neglected their duty, and in their carelessness were not aware of their situation or the danger they were approaching, and did not hear our hailing until just as the vessels came together; then, under the excitement incident to so alarming and unexpected a position, they rang the bell and hove the wheel, even without hope of avoiding the impending disaster.

XI.

There was room and water enough west of the entire tow for the propeller to have passed without a collision and without going aground; and had she not sheered eastwardly there would have been no collision.

Capt. Buckly: "Propeller could have gone clear but for that sheer." 86

Witness is well acquainted with the channel at that place; has been for 35 years."

"Plenty of room for propeller to have gone west of Isabella.

"*Channel* 400 *to* 600 *feet wide at place of collision*, and river half a mile wide." (Fol. 86.)

"If propeller had kept on her course after she passed Indiana, thinks she would have gone clear of Isabella." 87

"Witness stood where he could see the whole transaction." (Fol. 87–8.)

Capt. Hale: "Thinks if propeller had kept her course, straight down on her then course, she would have passed 50 feet west of Isabella. Thinks she passed 50 or 60 feet west of Adams." (Fol. 91.)

Thinks there was room enough in channel for propeller to have passed the whole tow without getting foul of it. (Fol. 92.)

"Should think, from his experience, in that channel it was wide enough for propeller to have gone west of tow." (Fol. 92–3.)

"Thinks her altering her course in that manner, caused the collision."

"Should think there was room enough west of her for propeller to pass down." (Fol. 93.)

Capt. Van Ostram: "Has been long acquainted with the place, and has met great many tows there."

His impression is, propeller would have gone safely clear of all the tows if she had kept her course straight down—probably 50 feet. (Fol. 98.)

"Supposes there was room west of barge for propeller and Oregon to pass there abreast." (Fol. 99.)

P. O'Brien: "There was room enough for propeller to pass clear if she kept her course; should say over 50 or 100 feet west of Isabella." (Fol. 102.)

J. O'Brien: "There was sufficient room for the propeller, west, to have gone clear."

"Run on the river 8 or 9 years." (Fol. 106.)

"Has often towed vessels through that channel."—(Fol. 108.)

Smith, steward on Indiana: "He thinks propeller would have cleared the tow had she kept a straight course down the river." (Fol. 109–10.)

Capt. Smith: "Thinks propeller could have gone clear if she had not taken the sheer in." (Fol. 112.)

Capt. Baily: "There could have been no collision if propeller had kept her course before the sheer." 124

"Should judge she had plenty of room to pass west of him."

"Witness is acquainted with the channel.

"His attention was particularly directed to the propeller, &c." (Fol. 124–5.)

Ensign: "Oregon passed the propeller on the west side, after the schooner had got out of my way." 25th answer.

"I am well acquainted with the river at, above and below the place of collision, and with the course and depth of the channel." 27th answer.

"Oregon 400 feet in rear of propeller at time of collision." 38th answer.

"I put the engine in operation and passed the propeller about the time of the collision." 44th answer.

"*We passed on the west side of propeller and about 100 feet from her.*" 45th answer.

I think we could have gone about two (hundred) feet further west than we did on passing her, without going aground or ashore." 46th answer.

[It is proper to add that the word "hundred" is not in the commissioner's minutes, and was omitted by mistake. In our minutes, kept at the time, it is written and we supposed it was to be found in the original until it was returned.]

"I think the collision could not have occurred if the propeller, after passing the Indiana, had not changed her course." 49th answer.

There was no obstruction or difficulty in the way of the propeller passing the Isabella to the west, on the courses the respective vessels were then on, that I could see. 50th answer.

There was sufficient room and depth of water to enable the propeller to pass the Isabella on the west side without going aground or ashore." 51st answer.

Testimony of claimants' witnesses:

A. Wilson: "Propeller was compelled to go eastward to avoid the sand spit."

That this is a false excuse is established by all our own witnesses as well as by the maps. (Fol. 135.) He says: "From 150 feet west of centre of channel where Isabella sunk; across channel to island, about 200 feet." (Id.)

He makes the channel 200 feet wide and that its centre was within 50 feet of the east shore. As the proof establishes the fact that the Isabella was east of the centre of the channel, this witness shows that the propeller had 150 feet of the channel on our west side to pass.—There was no sand spit or sand bar at or near this point. An effort was made to tow this boat onto a sand bar, and after hauling her nearly half a mile none could be found, and she was allowed to sink in deep water.

Groesbeck tried to tow the Isabella to the sand bar, but could not get her there before she sunk. (Fol. 163.) He towed her a distance exceeding the entire width of the river, and then left her nearly crosswise thereof.—While lying across the river she was passed by the Oregon. (Fol. 120)

The Oregon passed the propeller 100 feet to the west. Ensign, answer 45.

Smith, (fol. 109,) followed the Isabella 500 feet from the place of collision.

Capt. Smith, fol. 116, testifies that "she sunk one-quarter of mile *or more* from place of collision."

No sand bars or sand spits had been discovered.

"If propeller had not hit, Oregon probably would, for should not have had time to have got out of her way."

Wilson seems to have made up his mind that the Isabella was doomed to be sunk, and that it made but little difference whether it was accomplished by the Oregon or by the propeller.

So far from there being danger of a collision with the Oregon, it must have required a special effort to have produced one. She was 400 feet (38th answer) astern at the time of the collision, with her steam shut off, and waiting expressly to allow the propeller to pass, as is testified by her pilot, Ensign.

"Might have been 8½ feet water when abreast of 1st tow." (Fol. 138.)

T. M. Wilson: "When they passed Indiana there was not water enough for Oregon to go west of propeller." (Fol. 143.)

This statement is contradicted by the maps and the testimony, and is not sustained by a single circumstance.

Blake, junior: "Can't say if propeller could have avoided Isabella by porting her own helm as she passed her."

"Don't think she could have gone west of the last tow of boats, nor that there was water enough."

"Cannot say positively."

"Is son of last witness; heard his father's testimony. (Fol. 152.)

"Cannot say positively the depth of water 200 *feet west* of propeller."

"Cannot say that he was ever aground exactly *at that place.*"

"Others know that channel better than he does."

"Cannot tell exactly where the spit lies there." (Fol. 153.)

Notwithstanding his want of nautical experience and his confessed ignorance, this boy's testimony is relied upon by the claimants' counsel to show an insufficient depth of water to pass on the west, and this, too, when he swears he cannot tell "the depth of water 200 feet west of propeller," nor but that "the propeller could have avoided Isabella by porting her own helm."

We insist from the proof in the case that the propeller could have passed down 200 feet still further to the west than she did go, without striking bottom or going ashore.

Groesbeck testifies that he lay over as far west as he dared to go, but he was the pilot, at the wheel, and responsible for the collision, and as we have clearly shown, must have been asleep or paying no attention to the tow connected with the Indiana.

He gravely swears: "*Thinks* would have been a collision had he stopped then." f 163

"Isabella crossing his bows." id

This, too, when the proof is overwhelming that the last tow were on the east side of the centre of the channel, hugging the eastern shore as closely as it was safe for her to go; striving faithfully to get out of the way of the propeller, and not having been seen at all by the latter until the moment she hit and sank her.

"But 6, 8 and 10 feet of water west of place of collision."

How far to the west of this place, whether 100 or 400 feet, the water was ten feet deep, he does not state.

"*Supposes* there might have been 8 feet of water there!!!"

"*He did not touch bottom at time of collision.*" (Fol. 163.)

The propeller drew only 6½ or 7 feet. (Fol. 162.)

As he did not touch bottom, he had over 7 feet, and for ought he shows, the same depth may have extended to the west several hundred feet.

We might refer to the testimony of Van Drom, though we confess our inability to understand it; whose stupidity as a witness is only equaled by that as a lookout. He says:

"Saw first tow behind Indiana had a short hawser; was then about 100 yards west of the point of the Island, nearly opposite but not quite down to Island: could see bearing S. E. of him."

Whether the propeller or the 1st tow was 300 feet west of the point of Mull Island, does not clearly appear, but it establishes the fact that *there was sufficient depth of water and good navigation 300 feet west of Mull Island*, and at the Island Wilson says the water was 10 feet deep.

"Bearing S. E. of him."

If the first tow bore S. E. of him, it must have been above the point of the Island, and some distance above.

Capt. Lenox: "Should not like to have gone six feet further west that night. *Cannot assert the fact*, but should expect to go ashore by doing so."

To determine the weight and credit to be given to such evidence, we have merely to look at the circumstances under which it was given. He is the master of the steamer, was abed in his state-room and was aroused from his sleep by the collision of his boat, or by the bells and hailing which occurred simultaneous with the collision; he jumps out of bed, and in his fright rushes on deck to see what the difficulty was, and there, to his astonishment, found that his vessel had run into a canal boat. The weather, at the time, if Wilson is entitled to credit, "was so dark that had it been thicker he should not like to have run," and yet, with all these difficulties, and under this excitement, he tries hard to express an opinion as to his locality, and guesses he would not liked to have gone six feet further west.

XII.

THE NIGHT.

On this point the proof is contradictory, but in our judgment it is immaterial whether the night was light or dark.

If it was a clear, still, light night, as we suppose, the propeller could have seen its way, and by proper care could have avoided the collision, and is responsible for not doing so.

If a thick, dark night, then the navigation in a narrow channel became hazardous and required extra care and caution from navigators. They were bound to feel their way slowly and surely, even if not aware that they were soon to pass other vessels; but when informed, as they were in this case, that they were approaching a steamer with a tow, still greater care and vigilance was required

of them, and if at all doubtful, their motion should have been stopped altogether. They had it in their power to avoid this collision; not having done so, they are responsible for all the damages that ensued.

Buckly: "The night was a good one to run a boat; not a dark night." (Fol. 84–5.)

Van Ostram: "Night not very dark; a good night for running; shore objects did not loom off so as to deceive light." (Fol. 99.)

Hale: "Night not very dark; could see distinctly both shores; is of impression it was star light." (Fol. 95.)

O'Brien: "Saw the shore."

The claimants' witnesses represent the night as "pretty dark," "rather dark," &c.

XIII.

THE PLACE OF COLLISION.

It occurred between 100 and 400 feet above the point of Mull Island, where the river was half a mile wide, and the channel from 300 to 600 feet wide.

Buckly: "Collision was in mouth of Schodack channel, at a place called Mull; was above Mull Island."

Witness had hauled over to eastward; he headed up above the Island; Indiana about in range with the Island and the stern tow was a little above the end of the Island." (Fol. 89.)

A. Wilson, at fol. 154, says: "About 200 feet from the Island begins Schodack channel."

Blake, senior: "The mouth of Schodack channel is above the point of Mull Island, some 400 or 500 feet." (Fol. 150.)

Hale: "After passing Mull Island, steamer and her tow were straightened up the river, except barge and canal boat, and these had just began to straighten up to

eastward; were getting past the Island and *were working in line with steamer when propeller passed her.*" (Fol. 95.)

The Indiana, in order to follow the course of the channel, was obliged to go east after passing the point of the island, and therefore the *tow* could not work in line until entirely past the island.

"There is another island a little above where he was; channel was eastward of that island, but west of Mull island. The other island above was a mile or two off, and more to westward." B-95 B-96

"Witness was 120 feet astern of Indiana, and was from 90 to 100 fathoms from Mull Island." (Fol. 95.)

This places the last tow some 200 feet above Mull island.

P. O'Brien: "Thinks he was 800 or 900 feet above Mull island at time of collision. *Saw Cleveland above it.*"

"Took notice when propeller passed Isabella and Cleveland, and could see she (Cleveland) was above it just previous to collision." (Fol. 103.)

Capt. Buckly: "Thinks Indiana 800 or 900 feet above Mull Island at time of collision." (Fol. 105.)

J. O'Brien: "Thinks the last tow was above Mull island." (Fol. 108.)

Capt. Baily: "Had passed the point of Mull island and had straightened up." (Fol. 122.)

"Was perhaps 200 feet above Mull island at the time of collision." (Fol. 124.)

"Had no connection with libellants or Indiana line." (Fol. 126..)

Mullen: "Saw where Isabella sunk; it was about a quarter of a mile below the point of Mull island; thinks collision was about as far above the island." (Fol. 127.)

Without any appearance of an arrangement, or any understanding between the witnesses, they agree that the place of collision was a few hundred feet above Mull island, and after the tow had straightened up. All were

alive to the danger of the threatening disaster, and were anxiously waiting the result.

Though there is some disagreement among the claimants' witnesses, yet it is established by them that the collision took place at least 100 feet above Mull Island.

A. Wilson: "When he first saw those two last boats, they were just below the point of Mull island." (Fol. 130.)

"From best of his knowledge Isabella was not over 100 feet above the island." (Fol. 135.)

It is difficult to understand these Wilsons, but if we read T. M. Wilson's testimony correctly, he swears, "Collision took place about 100 feet above point of island." (Fol. 143.)

"Oregon 600 or 700 feet above point of island when he first noticed the light." (Fol. 144.)

The discovery of the light, the ringing of the bells and the collision all occurred about the same time, and the propeller was then just about in range ahead of the Oregon." (Fol. 139.)

"Bells rung immediately; might say almost same instant as it was discovered."

"Then collision took place." (Id.)

At the time of the collision, therefore, the Oregon was 600 or 700 feet above the point of the Island, and directly in range, and as we suppose, in rear of the propeller.

The distance between the place of collision and the point of Mull island, depends upon the distance between the Oregon and the former place. If the Oregon was immediately in rear of propeller, then some 500 or 600 feet intervened; in any event, however, it must have exceeded 100 feet, showing the erroneous calculations of the witnesses.

Blake, senior: "*Calculates* Isabella was opposite the point at time of collision." (Fol. 148.)

"Heard bells of propeller; his boat was then about off the mouth of Schodack channel, and *thinks* he was little above the point of Mull island." (Fols. 147–8.)

"The mouth of Schodack channel is above the point of Mull island some 400 or 500 feet." (Fol. 150.)

This fixes his location at the time he heard the bells, 400 or 500 feet above the point of Mull island. His boat was of the first hawser tow, and from the evidence about 120 feet above the Isabella. If we deduct that number of feet from 400 or 500 feet, we have 380 or 280 feet as the distance of the Isabella above the point of the island, instead of being opposite thereto *as he calculated.* The proof is overwhelming that the ringing of the bells and the collision were at the same time.

He apologizes, it is true, and says: "He has had not much experience at that place." (Fol. 150.)

"*Thinks* the collision took place *northwest* of Mull island." (Fol. 150.)

He must have forgotten his previous testimony that it was opposite the point. If northwest, then it must have been above the point and of course could not have been opposite.

These Blakes, father and son, seem to have been well prepared for their direct testimony, but make an unconnected and irreconcilable statement on the cross-examination.

Blake, the son: "Propeller passed him a short distance above Mull Island." (Fol. 151.)

This is quite indefinite.

"Could not say particularly whether Isabella was *above* or *below* Mull island at time of collision." (Fol. 152.)

"Can't say positively the depth of water 200 feet west of Isabella."

"Others know that channel better than he does."—(Fol. 153.)

"Cannot tell exactly where the spit lies. Could not say if Cleveland was above or below head of island."—(Fol. 154.)

Groesbeck: "Collision was 50 or 100 feet below point of Mull Island." (Fol. 161.)

This is a new position, in which he is contradicted by all the witnesses on both sides.

He, however, persists in this error, and adds:

"The Isabella could have gone within 10 feet of the island that night," &c. (Id.)

It is probable Groesbeck supposed Mull island to be Schodack island, opposite which the collision did take place.

"Towed her (Isabella) southeast." (Fol. 164.)

This shows that his vessel was on a swing, and he continued to change his course, in order to run southeast, until he made nearly half a circle, or 16 degrees.

"She was on his starboard side against barge." (Id.)

This is precisely where his swerving, circular course would have taken him to, and he was compelled if he turned her at all, to take the Isabella upon his starboard side.

It may be claimed that Van Drom stands by Groesbeck. He certainly ought to do so, being *pari delicto;* standing by him at the wheel house and evidently paying no attention to his duties as look out.

Van Drom: "When abreast of Indiana propeller was 30 or 40 fathoms above Mull island." (Fol. 168.)

"When passed Indiana was above Mull island and standing straight down the river; he was about 100 yards west of the point of the island—not quite down to it, and could see (the first tow) bearing southeast of him." (Fol. 165–6.)

This necessarily places the first tow some considerable distance above Mull island, and sufficiently far to bring the last tow also above it.

XIV.

That they were deceived or misled by the Isabella's light is untrue in fact as well as a miserable apology for

their negligence—it not having been seen by any one on the propeller until about the moment of the collision.

They paid no attention to the tow, or to its length, and seemed equally regardless of the narrowness of the channel.

After passing the Indiana, instead of keeping a direct course down the river, they carelessly sheered the wrong way, and without any proper watch on deck, dashed along at full speed, and did not discover their danger until the collision became inevitable, and then, with the forlorn hope of reducing the danger, they attempted to port their helm and change their wheel.

The whole case establishes this point. No one of the crew of the propeller was out on deck except the stupid Van Drom, who seems to have been occupying the attention of Groesbeck, the wheelsman, so that he made no discovery till the moment they were running into the Isabella; and there in a narrow navigation, where vessels never come to, supposed the light he saw to be a vessel at anchor: and however remarkable the coincidence may be, his companion, the wheelsman, saw the same sights, entertained the same suspicions, was alarmed under the same circumstances and gives about the same testimony.

Capt. Buckly: "Saw Isabella's light: it was swung by some one and then disappeared." (Fol. 86.)

"Saw light moving on Isabella after propeller passed him." (Fol. 89.)

"Capt. Smith: "When he hailed propeller, had a light in his hand." (Fol. 111.)

"When he came forward from stern cabin he stood forward on bow cabin deck; light was in his hand; he kept it in his hand in walking forward, and in that way it swung in his hand." (Fol. 113.)

"No light on his boat exposed to sight except one in his hand." (Fol. 114.)

"Had a very high loading on deck, and took his light out in his hand to light a woman across the deck to her

cabin, and standing on the forward deck a few moments after saw the propeller's light." (Fol. 116.)

Capt. Baily: "Saw a light in the hand of some one of the men of the Isabella; he was walking along with it." (Fol. 125.)

CLAIMANTS' WITNESSES.

A. Wilson: "When he first saw a light on two stern tows he thought it a vessel at anchor." f. 130

"Did not expect to see a light on tow boat, and seeing light, deceived him, and made him think it was a sloop at anchor."

If he was thus deceived, he labored under the delusion only a very short time, even less than a few moments, as is shown by his namesake.

T. M. Wilson: "Bells rang immediately; *might say almost same instant*, to slow, stop and back, *and then collision took place.*" (Fol. 139.)

Groesbeck, the pilot of the propeller, sustains them on this point, saying: "Stopped and backed, and collision occurred *within* 20 *seconds!!!*" (Fol. 160.)

A. Wilson: "Ascertained that tow was not a vessel at anchor when she came out astern and showed her light."

T. M. Wilson: "Saw a light below on west side of channel, and supposed it a vessel at anchor." f. 139

"Just as collision took place observed it to range from west to east." id

Here he confesses he never saw the light till the collision.

"Should take such a light as giving notice of a vessel at anchor."

As the collision occurred, from his own statement, within 20 seconds!! he was not long in his ignorance.

All these witnesses insist upon laboring under the same error, and hence corroborate each other in a body.

That the propeller sheered to the east, and continued on that course, is established beyond question.

If the Isabella came out from the west and headed to the east, how is it possible she could have been hit on the bow? Her course must have been entirely variant from that of the propeller, so much so in case of collision, that she must have been struck a slanting blow, aft of her bow, on the larboard side.

The Blakes bear no testimony on this point.

Groesbeck: "Passed on west side of Indiana. Saw she had a tow." fol. 157.

"Saw a light ahead, and vessel; appeared to be well into west of him, and supposed she was at anchor." id.

Here the witness stultifies himself and shows that he is entirely unworthy the trust committed to his care. Alike regardless of the human life and property entrusted to him, he *supposes* that *this vessel*, which he swears *he saw*, was at anchor, and that, too, in a narrow channel, immediately after passing the Indiana, when he says "he saw she had a tow."

"When witness first saw the light, he was then about half way between Indiana and her 2d tow." (Fol. 157.)

"When he passed that tow, discovered that light was not on an anchored vessel by its taking a *rank sheer to eastward.*" fol. 159.

This was the time when he made the rank sheer in the same direction.

Like the man reeling with intoxication, every person he saw was dead drunk and himself alone sober.

Some of the witnesses place the sheer a little above, while all the others agree that it was when abreast of the 2d tow.

If he then saw our light take such a rank sheer to the east, why did he turn in the same direction? It is worse than madness to suppose he would have ventured a change which must inevitably have brought about a collision.

Again: If while at such a distance he saw us sheer to the east and knew it was a part of the tow, why did he continue his headway? Why did he not stop and

avoid the difficulty which he must have known was inevitible on his then course.

"His attention was directed to the light and he did not lose sight of it."

If our theory is correct, that he never saw the light till just at the moment he ran into the Isabella, it is not probable that *he lost sight of it.*

And If his own story is true, he never had our light in his eye to exceed 20 *seconds*, that being the time that the collision occurred after the ringing of the bells.

"The light he saw moved from west to east." 3-163-

"The light, when he first saw it, he thought was moving, as if carried, and was then set down and remained stationary."

All this was done in 20 seconds ! ! !

"Is not customary to have lights on deck." 3-164

Ours was in a hand, and he said, "he thought it was moving as if carried."

"*Has often seen one carried across the deck; might be done to find the way across decks or to look for something.*" (Fol. 164.)

Here he gives our case and justifies it fully, stating "he has often seen one carried across the deck."

Van Drom: "Saw light, believes, when he got abreast of 2d tow." 3-166

His eyesight, while on deck, was not quite as sharp or far-seeing as that of Groesbeck, who, though in the wheel house, and looking through a window, saw the same light when half way between Indiana and 2d tow.

Halligan, Expert: "Not usual to have lights on a boat towed." 3-174

"Is not in towing business."

"*Should not suppose a vessel at anchor if he saw a light moving about her deck.*" 3-175

Groesbeck, Wilson, Smith, Baily and others swear that our light was moving about.

Miller, Expert: "If he sees a light shine from a vessel, supposes she is at anchor." B-175

This is a novel position, especially as the law requires vessels to carry lights, and they are seen invariably.

"*Not unusual for a man to be carrying a light across deck before it was hung up.*" (Fol. 176.)

After all he admits a vessel must have a light, and may carry it across the deck before he hangs it up.

Van Arsdale: "Always calculates a vessel is at anchor if he sees a light on her." B-179

"*Never saw a light on a moving vessel on a very dark night.*" id

THE LIBELLANTS RECALLED.

Capt. Van Ostram: "It is not unusual to have a steady light on a stern tow, *but frequently is done* to warn a boat approaching that a barge is in the way." (Fol. 176.)

Capt. Baily: "As Isabella was situated, witness would have taken a light swung to show when a vessel came near to her. (Fol. 177.)

Capt. Buckley: "Proper to show a light on Isabella when steamer came near to her and then put it away." (Id.)

"It is done as warning to steamers."

"Have seen it done frequently."

Capt. Hale: "Think, under the circumstances, it would be proper for Isabella to show a light." (Fol. 178.)

XV.

The collision was occasioned by the carelessness, negligence and mismanagement of those in charge of the propeller.

1st. By departing from her course and sheering to the east when she passed the 1st hawser tow.

SEE IXTH POINT ABOVE.

Showing her departure from her course and that the collision was caused thereby.

The rules of navigation require that she should have kept to the right, and we have already shown that she had both room and water sufficient to have done so.

But if she could not have passed us on the west, she had the power to go or not to go, and could and *should* have stopped and learned her true position.

This would have avoided the disaster, which, if possible, *the propeller was bound to do.*

2d. The pilot neglecting to slow his engine when he first met our tow, and passing it slowly and cautiously so that he might have ascertained its length and the true situation of the different boats attached to it.

As a navigator, at the helm, and the only one in command at the time, *he was bound to know* that this was a narrow channel, and should have been thoroughly acquainted with its navigation.

He was bound to know that the tow might extend 600 feet more or less behind the Indiana.

He was bound to know that the tow might not be directly in line or in rear of the steamer, but might be to the west of it or even in his track.

He was bound to know that in such a narrow channel, where there were no landings and no occasion for landing, a vessel would not be likely to be at anchor unless forced to do so by accident or stress of weather. For ought shown by the proof a vessel was never known to be at anchor there, or to have stopped there.

The very fact that such an event would be unusual and extraordinary, should have alarmed the pilot and induced him to exercise greater vigilance, to have slowed his engine and felt his way cautiously until he had ascertained what was in his way and how it was situated.

He was bound to know that while he could control the speed and direction of his steamer, those tows were comparatively helpless, and could not get out of his way. That if he dashed amongst them at his ordinary speed, he must be responsible for the results.

He was bound to know that the barge he had in tow on his starboard side, rendered his vessel more difficult to control and less liable to obey his helm, which furnishes an additional reason why he should have stopped the steamer.

3d. There should have been a capable officer of the watch on deck, besides the man at the wheel, and on that vessel and at that place there should also have been a more efficient and competent man as lookout.

Here was a large steamer, manned, doubtless, with a numerous crew—perhaps 20 men—yet, in the night, and as they insist in a dark night, on a river where they are constantly meeting vessels, in a narrow, meandering channel, *only two men* are shown to have been on deck, one at the wheel and the other standing close by him at the wheel house door, neither of whom made the discovery of the approaching tow until by a change of course they were just running into it.

The captain of the vessel was abed in his cabin, while upon the pilot devolved the double duty of managing his wheel and giving orders to the engineer, by the bells.

The master of the watch should have been on deck, disembarrassed from any confinement to the wheel, where he could have seen his situation, and observed what was passing and been able to communicate both to the wheelsman and to the engineer, instantly, such orders as the exigency of the case might have required.

The court passed upon this question in the case of Fitzhugh, et. al. *vs.* The Cuba. 12 How. R. 462, and there lay down the broad doctrine that "It is the duty of every steamboat, traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout *besides the wheelsman.*"

In this case the court further say, page 35: "By a proper lookout we do not mean merely persons on deck, who look at the light, but some one in a favorable position to see, stationed near enough to the helmsman to communicate with him and to receive communications from, and *exclusively employed* in watching the movements of vessels which they are meeting or about to pass.

"It is impossible for the helmsman to steer the vessel and keep the proper watch in the wheel house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check, suddenly, the speed of the boat, and whenever a collision happens with a sailing vessel, and it appears there was *no other lookout* on board the steamboat *but the helmsman*, or that such lookout was not stationed in a proper place, or not *actually and vigilantly employed in his duty*, it must be regarded as *prima facie* evidence that it was occasioned by his fault.

"She has command of her own course and her own speed, and it is her duty to pass the approaching vessel at such a distance as to avoid all danger when she has room; and if the water is narrow, her speed should be checked so as to accomplish the same purpose." (Id. page 463.)

4th. The propeller was not steered by the compass, nor is there any proof that any reference was had to one to ascertain their course or their bearings.

5th. If there was a sand spit in the way and the only alternative was to go on to it or sink the Isabella, the propeller should have taken the hazard of the former.

It was a mere sand bar; accumulations produced by the surging and washing of the water—no rock or hard substances; gradually sloping into deep water, and if run upon could have produced no injury to a vessel nor could it have held her long.

We deny, however, that the spit was in the way, and insist that there were several hundred feet of spare room

west of the collision, actually traveled by vessels that night, which could have been occupied by the propeller. Frazier's map also shows that there was water enough on the spit to allow of the passage further west.

Nor do we consider that the collision occurred opposite to this spit.

6th. The claimants show by their witness, Groesbeck, fol. 161, that he would have avoided the collision by going only 6 feet further west.

If so, was he not bound to have saved this loss of property and the then hazard of human life?

Will it be seriously contended that 6 feet further west *might possibly* have brought him upon a sand bar, and to avoid such a *possible* contingency he was justified in destroying a large amount of valuable property, and periling the liver of those having it in charge.

Should she not have experimented at least 6 feet under such circumstances?

And that, too, when the proof is abundant and conclusive that she could have gone at least 200 feet further west in safety.

There is no positive testimony that she could not have gone further west without grounding, but on the contrary the evidence referred to under the XIth point demonstrates that there was sufficient room and depth of water.

Even this very pilot is forced to confess that there was "6, 8, or 10 feet of water *west* of place of collision."

"He did not strike bottom at time of collision. Propeller drew 6½ to 7 feet."

Away then with so absurd a pretence that he run into us because he was forced to do so for want of water, when he confesses he had 2 to 3 feet in depth to spare, to an unlimited distance.

XVI.

The weight of positive testimony on all the material facts, is with the libellants.

The libellants called 9 witnesses who saw the transaction, and speak of it from personal observation, to wit: Buckly, Hale, Van Ostram, P. O'Brien, J. O'Brien, H. B. Smith, Wm. Smith, Baily and Ensign.

They also called Mullen and Baily who were in the cabin of the Isabella, and came out on hearing the noise, making two more. Also Capt. Frazier, as to the maps.

The claimants called the two Wilsons, the two Drakes, Groesbeck, Van Drom and Sailor—seven all told—who also claim to have seen the transaction, besides Lenox, the captain, who was in his bed, and Van Arsdale, who was in the wheel house of the Indiana, and Moody, in the propeller's engine room. The last one saw nothing and the other two were not situated where they could see much.

They also called two experts and one man as to a map.

The libellants' witnesses had fuller and better opportunities of observation and knowledge, and have testified with great candor and impartiality. They were in the immediate vicinity of the entire transaction, as well as deeply interested in the threatened danger, and watched closely everything that occurred.

FIRST—THE LIBELLANTS' WITNESSES.

Buckly: A seaman on the Hudson 35 years, and had been acquainted with the channel at that place for the last 35 years.

"Stood as far back on promenade deck as he could get, and was on a high place where he could see the whole transaction."

Capt. Hale, On barge John Adams, tailed to a boat on larboard side of Indiana: "Been a seaman on the river 9 or 10 years steady. Was sitting on the stern. Been running a barge 9 or 10 years."

Capt. Van Ostram, on barge Rathbone to which the John Adams was tailed: "Been in towing business on the river 25 years."

"Was standing on larboard bow of his boat. Has been long acquainted with the place and has met great many tows there. Had no connection in interest with the Indiana."

P. O'Brien: Barge Monteith on starboard side of propeller; seventeen years seaman on the river.

"Was on upper deck aft."

"Observed her course and supposing she would run into steamer, watched her till she struck."

J. O'Brien: Scow O'Neil, middle tier of 4 canal boats. Eight or nine years seaman on the river. Was not in employment of persons connected with the Indiana.

"Was pilot part of two seasons.

"Has often steered vessels through that channel."

Wm. Smith, steward of Indiana. "In the pilot house; been steward two years."

H. B. Smith, Isabella: "Was on deck and closely watched the whole transaction."

Mullen, a hand on the same.

Bealy, also a hand on same.

Baily, master of Cleveland in same tow with Isabella: "Four years on the river.

"Stood forward on promenade deck where he could see whole transaction.

"He had no connection with the libellants or with the Indiana Line."

Frazier as to the maps.

Ensign: 1st pilot of the Oregon, and on duty; been on the Hudson river as seaman since 1825, and as a pilot since 1835.

SECOND—CLAIMANTS' WITNESSES.

Crasper, as to maps: In claimants' employ, and subpœnaed their witnesses.

A. Wilson, 2d pilot on Oregon: In wheel house.—We have no information what his experience has been.

T. M. Wilson, wheelsman of Oregon and in the wheel house: "Navigated river 32 or 33 years," but don't tell in what capacity. In so long a service without rising higher than wheelsman is not very complimentary to him.

Moody, engineer of propeller: In engine room and saw nothing.

Groesbeck: Pilot, at the wheel. Seaman since 1824. He has not been much favored by promotion.

Lenox, captain: Abed in cabin. 8 years on the river.

Not one of the above named witnesses were out on deck.

E. Blake: On scow Bloomer, at the tiller. "30 years on steamboats and sloops as *hand*."

"Has not much experience at that place."

Nor any where else, we should suppose, as a seaman.

C. Blake, the son: 7 or 8 years boatman. "Others know that channel better than he does."

Van Drom, lookout: Says nothing as to his experience or his business in life.

Sailor, on Tacony: About 3 years on the river, but does not tell in what capacity.

Hilligan, expert: 10 years on the river.

Muller, expert: 28 years on the river.

Van Arsdale, pilot: 30 years on the river, but omits to tell in what capacity.

None that saw any part of this transaction were out on deck, except Van Drom, Sailor and Blake, senior.—Young Blake has not told where he was, and all the others were in wheel house, engine room and in the cabin.

How many persons constituted the crew of the propeller, and whether all were aboard does not appear. We have no account of any others than the captain, pilot, engineer and lookout, with only the last named one on deck.

Quite a small crew for such a craft.

A. P. GRANT,
Of Counsel for Libellants.

DECISION IN ADMIRALTY.

U. S. Circuit Court.—Before Chief Justice Nelson.—The following decision in Admiralty, on appeal from the court below was rendered yesterday:

H. Fitzhugh et. al. vs the Steam Propeller Commerce.—Nelson, C. J.

The libel in this case was filed by the owners of the canal boat Isabella, against the Commerce, for a collision on the North River, near Castleton, some ten miles below Albany. The steamboat Indiana was ascending the river on the east side, with a tow of ten boats. The Isabella, the one in question, with barge Cleveland, were the last tier, and were connected by a hawser to the tug. There was an intermediate tier of four canal boats, also connected by a hawser, some two hundred feet in advance of the two last. The Indiana had passed Mull island, and had straightened up on the east side of the river, as near as it was safe for her to go, and had advanced so far that the last tow was opposite or just above the head of the island. The Commerce had left Albany that evening, and was descending the river on the west side, the Oregon following her at a distance of a few hundred yards. The night was not very dark. The Commerce, after passing the Indiana west from 70 to 100 feet, when about opposite the 2d tier of tows, took a sheer to the east, and thus changing her course, struck the Isabella, which was lashed to the larboard side of the Cleveland, and, of course nearest the Commerce, sinking vessel and cargo. The court below was of opinion, upon the proofs, that the Isabella was wholly in fault, being out of place at the time, and far in towards the west shore, and in the track of the Commerce, and dismissed the libel. The conflict and obscurity of the proofs on this point have been very much cleared up by the evidence of the pilot of the Oregon, who had charge of that vessel, which has been taken in this court since the appeal. The evidence of the master of the Indiana, and of six of the tows, is very full and explicit, that, at the time of the sheer of the Commerce, the two last tows, the Isabella and Cleveland, were on a line, or nearly in a line with the tug, which confessedly was as far to the east shore as

was safe; and the master of the Cleveland, to which vessel the Isabella was lashed, states that his vessel was about as near the shore as prudent for him to go. And further, they all agree that there was room enough for the Commerce to have passed west of the tow, and that the sheer was unnecessary, and the direct cause of the collision. These witnesses all saw the sheer, which, indeed, is admitted by the witnesses for the Commerce; and, apprehending a collision in consequence, watched the course of the vessel until it happened. They speak, therefore, with confidence as to the transaction, and, indeed, cannot well be mistaken; and they are fully confirmed by the testimony of the pilot of the Oregon, who also apprehended a collision when he saw the sheer, and kept his eye on the Commerce. The evidence of this pilot, who was first pilot of the Oregon, very much shakes the testimony of Wilson, the second pilot, who was examined on behalf of the respondents in the court below.

The defence set up to justify the sheer is placed on two grounds: 1. That there was a light on the Isabella, and that the pilot of the Commerce supposed, and had a right to suppose, she was a vessel at anchor; and that, being well out in the channel of the river, he made the sheer to pass her on the east side; and 2. That she was so far out in the channel there was not room to pass her on the west side. As we have already said, the testimony of the captain of the tug, and of six of the tows, is very strong to show that the pilot was mistaken as to the room in the channel west of the Isabella. But in addition to this, is the evidence in this case of the pilot of the Oregon, who was looking on, and who passed over the tract just at or near the moment of the collision. And as it respects the light on the Isabella, it was in the hand of the master, who was moving about on the boat at the time, and under the circumstances, we cannot but be of opinion that if proper attention had been given to the navigation of the Commerce, it would have aided in admonishing the pilot of her position as one of the tows of the Indiana instead of confusing or embarrassing him. The pilot of the Oregon, who had charge of that vessel and who was several hundred feet behind the Commerce, had no difficulty at the time in regarding this vessel

with the light as the tow of the Indiana, and apprehended a collision from the moment of the sheer of the Commerce. The channel of the river was only from three to four or five or six hundred feet wide at the place of the collision, in which were the Indiana with her ten tows ascending slowly the river—the Commerce and Oregon descending, and in respect to which navigation some embarrassment existed; and yet, the weight of the proof is, that the speed of the Commerce was not checked till at the moment of the collision, nor any of the usual precautions taken under such circumstances. The Oregon immediately checked her speed, and took measures to prevent any accident. It should be remarked, also, in respect to the question of room in the channel of the river for the Commerce to pass on the west side, that there was a schooner ascending the river with her boom out, between her and the Indiana, at the time she passed that vessel, clearly showing that the Indiana and her tows must have been well to the east shore. Upon the whole I am satisfied that the error of the Commerce in taking the sheer mentioned, led directly to the disaster, and that no sufficient excuse has been shown for the manœuvre. The decree below, therefore, must be reversed, and a decree entered for the libellants, with reference as to the damages.

The libellants' answer and argument to exceptions, taken by the claimants, to the Commissioner's report:

The claimants' counsel filed seven exceptions to the report made by the commissioner in this case, but in his argument in the U. S. Circuit Court, he abandoned most of them. We suppose he is to be confined to the exceptions raised on the trial, and that it is a settled rule of this court, that a party on an appeal cannot urge exceptions which were not raised in the court below.

We propose to take up the exceptions, in the order they were made, and answer each one of them.

1.

The first exception is not tenable for the reason,

First—It should have set forth specifically the evidence which the counsel claimed was incompetent and irrelevant.

Second—The only objections taken by the claimants' counsel to the testimony, were in relation to the evidence given by the witnesses Campbell and Littlejohn. Campbell was the tallyman and kept the tally of all the goods put on board of the canal boat Isabella, and had his tally book with him, and was asked, "what goods, merchandise and property were put on board of said boat, in New-York, on the 19th of August, 1852, and tallied on board by him." (Page 53.)

That was the trip on which the collision occurred. The only ground stated by the counsel for the objection was, that "it was irrelevant."

To us, this proof seemed to be very important. The libellants were obliged to establish their damages, and to do this it became necessary to show what property was on board of the Isabella, and its value at the time of the loss. This was done by calling the witness, Campbell, who tallied the property aboard, and had his tally book before him; and then calling Smith, the captain, who testified that all the goods and property which were placed upon the boat in New-York, on the 19th of August, 1852, continued and were on board of her at the time of the collision and when she sunk. (Page 79.)

The next objection was to a question proposed to Littlejohn, in which he was asked if "he had paid to W. J. Gordon, for the appellants, any money, and if so, how much, for any goods lost on the Isabella," &c.

To this question, the counsel objected without stating any grounds for the objection.

Gordon was one of the owners of the goods which were on the Isabella at the time she was sunk, who had presented his claim, for the loss thereof, to the libellants, and had been paid therefor.

We held, and produced in evidence on the trial, the original bills of these goods made by the vendors in New-York to the purchasers, showing the items and the costs thereof; (page 53, No. 2. also claimants' admission, page 60 and 81;) we identified them and proved the sale and delivery of the goods and the costs thereof, (the cost price being all we sought to recover,) and also proved by the tallyman and others, as well as by the shipper's receipt, that these identical goods specified in said bills were put on board of said boat, and were aboard of her at the time of the disaster. (Page 79.)

We introduced the same proof in relation to each bill, and the same and no other or more specific objections was interposed.

Third—The claimants' counsel should have set forth the ground of his objections.

The proof we sought to and did introduce, was essential to our case, to establish the amount we had paid.

By the decree, the court had decided that the libellants were entitled to recover, and had referred it to a commissioner to take the proof and ascertain how much that recovery should be.

This evidence was indispensable to inform the commissioner as to the extent of the libellants' damages.

Perhaps the claimants intend here to urge, that the libellants made such payments in their own wrong, and were not legally liable to pay for any damages or loss to their goods. As common carriers it is well settled in the State of New-York, that they had at least "a qualified property in their goods sufficient to enable them to maintain an action in their own name for the injuries caused by the collision." Vide the opinion of Judge Betts, in Admiralty, in the following case:

EXCEPTIONS TO REPORT—COLLISION—DAMAGES—COMMON CARRIER—INSURANCE.

Alfred H. Hovey vs. *The Steamboat Sarah E. Brown.*—This case came up on exceptions to the commissioner's report.

The action was for injury done by the steamboat to a vessel called the Mist, then in possession of the libellant, and to the merchandise put on board her by its owners, and committed to the libellant's charge as a common carrier. The answer of the claimant denied the right set up by the libellant, and also denied that he had paid any money to the owners of the cargo because of any injury to it. The court upon hearing the cause, gave a decree for the libellant, and referred it to a commissioner to compute the damages. On the reference it appeared that the gross amount of the injuries caused by the collision was $6,667 81, including lighterage and preservation of the property, and that there was realized from its sale $2,353 59, leaving a balance of $4,314 24, for which sum, besides lighterage, towing and interest, the commissioner reported. The libellant held a general policy of insurance covering the property in question, upon which the libellant was paid by the company $2,950. The claimant alleged that this amount should have been deducted from the damages, as a satisfaction and extinguishment so far of the cause of action, and excepted to the report on this ground, and also upon the ground that the libellant proved no actual payment by him to the owners of the cargo, and that the libellant was not entitled to damages beyond those actually sustained by the boat.

Held by the Court—That the decision of the court upon the merits proceeded upon the ground that the libellant, as a common carrier, had a qualified property in the Mist and her cargo sufficient to enable him to maintain an action in his own name for the injuries caused by the collision.

That the claimant's exception to the allowance of damages beyond what he had actually paid, goes to the merits of the action, and the question cannot be brought up again by exception, but must be raised, if at all, by appeal, or at least by motion for a new trial.

Moreover, by the law of this State, a common carrier is a competent party to sue a wrong doer for and recover the full value of property injuriously interfered with by stranger while in his possession, (7 Cowen, 670; 2 Kernan, 343;) the same privilege and authority has been recognized in admiralty as belonging to him.

That the payment by the insurance company was not in favor of the steamboat or in discharge or extenuation of its liabilities. She by her fault had incurred a liability to the amount decreed against her for the consequences of the collision. This single responsibility, and nothing more, is sought to be enforced against her by this action, and it clearly cannot be claimed, as an acquittance of that charge, that another party under a contingent contract of insurance paid the libellant a portion or the whole of the liability which the steamboat had legally incurred to him. There is no privity of contract or interest between the insurance company and the steamboat in this respect. The company and the libellant may stand in quite a different relation in respect to the application of that money, but whether the company attempts to reclaim the payment made on her contract or abandons it, is solely a question between that party and the libellant, with which the claimant has no concern. (17 How. R. 152.)

Exception therefore overruled, except that the claimant is entitled to a recomputation of the charges, to ascertain whether "lighterage and towage" has been twice allowed by the commission.

The only remaining, other and last objection taken by the claimants' counsel to the proof was this question:

"What is the construction, under the general usage among forwarders, as to the liability of parties under such contracts for goods damaged on the rivers of the State of New-York, not connected with the lakes?"

The libellants' counsel had objected to the preceding question, and in getting an answer thereto, the claimants' counsel had drawn out from the witness, against such objection, what *he* (the witness) *considered* to be his liability as established by custom, and what was the universal custom of forwarding houses.

Therefore the libellants' counsel supposed he had a right to pursue the examination insisted upon and adopted by the claimants' counsel, and merely followed up this question of construction among forwarders.

Independent of that answer to this objection, the an-

swer does not affect or change the liability of any of the parties to this suit.

And the question and answer may both be rejected without affecting or changing the result of the report.

The contract for carrying goods, made between the libellants and the owners of them, are not admissible in evidence, and cannot be set up to prevent a recovery in this action.

They were between other parties, in which the claimant had no interest or privity of contract, and cannot be availed of in any way by them to defeat the decree or report herein.

The case above referred to, decided by Judge Betts, goes this length and must be considered as settling this point.

This is as much a private arrangement between the parties as the matter of insurance, and is considered in the same light. The parties to such contracts as between themselves, can insist upon the same, but outsiders, those who were not parties to them and have no privity of contract or interest in them, cannot avail of such an objection.

These are the only objections to the evidence which were taken by the claimant.

II.

This exception is not true in fact. The testimony of Campbell, the tallyman, and of Smith, the master of the Isabella, establishes the fact, together with the original bills introduced and the testimony of Littlejohn, that all the goods for which damages were allowed by the commissioner *were on board of the boat at the time of the collision.* (Vide page 79.)

We confess our surprise at this exception, having supposed there was no question of the kind to be raised, as none was raised on the hearing.

III.

Our answer to the first is also an answer to the third exception, and a review of all the testimony in the case will show most conclusively that the exception is not well taken.

Suits were not instituted nor was it necessary that the libellants should have been subjected to large bills of costs in a great many suits. It was their duty and their interest to avoid the accumulation of unnecessary costs, and to ascertain and pay these damages as early as might be practicable. In doing so they evinced their good sense and correct business management.

The sums due were in each case shown by the original bills of sale; the libellants' liability is established by law, and that the cargo was damaged to the amount claimed, is proven by the testimony. (Vide stipulations, page 81.)

IV.

The fourth exception is answered by the reasoning and the authorities referred to under our first point.—Worthington & Clark were entitled to pay for their goods which were destroyed by the collision, and the damages having been occasioned by the claimant, he is bound to pay them.

Another answer to this exception may be given which, we think, should be conclusive. The several sums referred to therein may be rejected and stricken out altogether, and the amount actually decreed to be paid to the libel-

lants will not be affected. The commissioner reported to be due to the libellants $11,443 15
He also taxed their costs at 375 45

Hence he virtually reports due to libellants, Nov. 13, 1858, $11,828 60

The bond given by claimant, and sureties on procuring the release from arrest of the propeller was for $10,000 00
And for costs to 250 00
The court granted the decree for the amount of the bond and costs only, being, with interest from Nov. 13, 1858, $10,250 00

This sum, $1,568 60
as the excess over the amount of the bond and costs, was rejected, and is not included in the decree.

The amount of Wm. Worthington's bill is $246 53
The amount of interest thereon is 104 77
" " " Wm. Clark's bill is 194 94
" " " interest thereon is 80 81 $627 05

Still leaving the sum of $941 55
over and above our decree, which has not been allowed.
Gordon's bill was $101 94
Interest thereon, 47 42
In all, $149 36

Leaving still, as surplus, and rejected $792 19

V.

The fifth exception is not true, in fact. Littlejohn's testimony, and that of Carter, (taken on deposition at Chicago,) establishes that the cargo was mostly destroyed; that such goods as were not destroyed were sent forward to the owners, while those that were damaged

and not entirely lost were properly cared for and saved, and were sold by the agent of the libellants at Albany, (F. S. Littlejohn) at the best advantage, and the proceeds of the sale thereof fully accounted for, (vide page 72,) and that the damages to the cargo amounted to the sum of $8,139 10.

VI.

The commissioner, at the request of the claimant's counsel, reported the amount of damages separate from the interest, which he had a right to do, and it was proper he should do so, and the proof fully establishes the amount he reported.

The bills were all proven except vouchers No. 1, 11, 18 and 31, and these were admitted by the claimants, on the hearing, to save the expense of producing the witnesses, and no question was ever raised at the hearing or argument that any of these bills were not proven. (Vide admission, page 60.)

VII.

The interest is incident to the damages. If entitled to recover damages, we are also entitled to the interest upon such damages.

The commissioner has given interest only from the time the libellants made the respective payments. We have now answered all the exceptions and we suppose they offered the only ground upon which the commissioner's report can be assailed.

It may be urged by the claimant's counsel that separate actions should have been brought; one by the owners of the boat, and others by the respective owners of the

cargo. If so, we answer, First, that no such point having been made before the commissioner, nor taken in the exceptions, it cannot be raised here; and Second, If it could now be raised, the objection is not well taken.

One action is often brought to determine the amount of loss to the boat and the amount of loss to the cargo, and the court has repeatedly sustained such joinder of actions, although the boat and the cargo belonged to different persons.

This very point was raised and decided in the libel suit of "Hovey vs. The Steamboat Sarah E. Brown," herein before referred to, which is perfectly analagous to this and in which the court says: "A common carrier is a competent party to sue a wrong doer for and recover the full value of property injuriously interfered with by strangers while in his possession."

In that suit the libellant sought to recover for the injury done to his boat, and also to the merchandise put on board of her by its owners and committed to his charge as a common carrier.

The claimants excepted to the report of the commissioner upon this, among other grounds, to wit: "That the libellants proved no actual payment by him to the owners of the cargo, and that the libellant was not entitled to damages beyond those actually sustained by the boat," and the court overruled the exceptions. This case is much stronger. Here the libellants have actually paid to the owners every dollar they seek to recover on the cargo.

Independent of the judicial determination of the court upon this very point, as a matter of justice and equity, and to avoid an unnecessary amount of very expensive litigation, the principle and the practice should be upheld. Take the case under consideration: If every owner was forced to file his libel, more than thirty separate suits must have been prosecuted, involving interminable delay, besides an amount of costs too large and burthensome to have been borne.

The libellants were common carriers, and as such were bound to carry and safely deliver to the owners the goods in question. This alone gave them such an interest in them aside from the fact that the libellants were in the possession of the goods, as will enable them to recover the value of the goods of the *claimants, the wrong doer.* The claimants can no more take advantage of the point made by them on this branch of the case, than they could had the goods been insured and the insurance money been fully paid. The principle is the same and it has been repeatedly held that the latter point cannot be maintained. The commissioner was correct in not deducting the amount of insurance paid.

Mollison vs. propeller Monticello, 17 H. U. S. Rep. 152.

Phillips on Insurance, §§21, 63, and cases cited.

Bull et al. vs. Fritz et al. 12 H. U. S. Rep. 466.

Yates vs. White, 4 Bing. N. C. 272.

Clark vs. The Inhabitants, &c. 2 Barn. and Cress. 254.

Ætna Ins. Co. vs. Tyler, 16 W. Rep. 385. The matter of payment and of the insurance was not set up in the answer.

The libellant, as common carrier, had such a special property in the goods in question, and such interest as bailees as to entitle them to support the claim for damages.

Angell on Common Carriers, §492–501.

Freeman vs. Berch, 1 Nev. and Man. Rep. 420.

Joseph vs Knox, 3 Camp. Rep. 320.

12 Barbour Rep. 595.

8 " " 213.

2 Sandford S. C. Rep. 440.

2 Kernan Rep. 343.

Perhaps it may be claimed by the other side that we have no sufficient allegation in the libel to justify a recovery for the moneys paid to the owners of the goods.

The libel specifies the damages to the boat and also to the cargo, and asks to recover the same.

In the 3d article, at Fol. 9, it alleges "that the boat was fully freighted with merchandise."

At fol. 13 it charges that the "canal boat was run into, broken and injured so that she sunk *with all her cargo, &c.*" This is repeated in fols. 15 and 16.

In the 8th article, fol. 17, it is alleged the boat was worth $1500, and that libellants believed she was destroyed and would be a total loss, "besides the damage they will sustain from the loss of the use of the boat in their line."

At fol. 18 "that she had on board *a large* and *valuable cargo of freight*, consisting in part of teas, coffees, sugars, fish, dry goods and other kinds of merchandise, together with a steam engine, of the value in all of $15,000. That from the nature of the cargo and of the injury, &c. the libellants believe that *a very large portion* of such goods and merchandise will be a total loss, and the remainder of them will be greatly damaged and injured in value, &c. That they will be subjected to *great expense, &c.* in endeavoring to *raise* the *boat and cargo*, &c. and that the *loss and damage* by means of the sinking of the boat and the *destruction and injury of the property on board* of her, and the expenses to which they will be put will amount to about $17,000.

At fol. 21 it prays a decree of the payment of the *damages aforesaid*, and that the said propeller be sold to pay the same, &c.

These extracts from the libel show as we suppose most satisfactorily, that all the sums allowed by the commissioner are covered by and claimed in the libel. It could not be necessary to allege that they owned the cargo or had a lien on it, but they do allege that they will be subjected to great expense in raising it and saving what could be saved, and this we understand to be an allegation that they intended to raise it—although we do not suppose that any such allegation was necessary.

The libel does ask a decree at fol. 21 for all the *damages and expenses* the libellants may be subjected to, &c. and if this means anything, it means a decree against the claimants for such sums.

The recovery is not sought in this case on the ground of payment by the libellants alone. But on the ground of the wrong done by the claimants and the consequent injury to the goods, for which the libellants were legally bound to and did pay the damages so sustained. The full effect of the injury or amount of damages was not known at the time the libel was filed. But the cause existed and the damages were the natural and consequent result of the wrongful act of the claimant's propeller.

Abbott on Shipping, 8th ed.

Top paging 318 note consequential damages.

Tindall vs. Bell, 1 Mess. & Webb, 228.

In the argument of the exceptions, the claimant raised the question, that if the damages to the cargo could be inquired into in this action, the amount paid by the libellants, since the commencement of the suit, to the various owners, was not evidence of such damage.

This testimony was admissible and was competent proof of the damage to the cargo.

We introduced, proved and read in evidence the original bills of the goods constituting the cargo, showing their actual cost in New-York. Consequently there can be no questions of fraud or unfairness as to amounts. Nor will it be proper to speculate as to what might be done in a given case, when we show what was actually done in this case.

2d. We showed the actual payments to the respective owners, in each instance, to the very amount reported by the commissioner, and that these several sums corresponded with the bills introduced in evidence, and were the original costs of the goods.

3d. The several vouchers, to the number of 32, were proven, read in evidence and filed with the commissioner, containing and sustaining every item allowed by him as we believe. (Vide pages 60–81.)

It is true that these payments were made after the commencement of this suit, and necessarily they had to be made after that event.

The libel, however, covers every claim allowed, and charges that it is expected that the boat and its cargo will be very greatly damaged in consequence of the sinking of the boat, and estimates such loss and damages to the sum of $17,000, and asks for a decree covering such amount.

The claimants in their answer do not deny a single allegation contained in the libel as to the fact that this boat was freighted with a valuable cargo of merchandise, which was damaged, as estimated, to the amount of $15,000, nor that a very large portion of these goods would be a total loss, nor that the remainder of them would be greatly damaged and injured in value, &c.

These allegations remain unanswered and consequently undenied, and the claimant cannot, especially after trial and proof taken, object to our evidence in support of them.

The claimant cannot set up or claim as a defence that the libellants were not liable to the owners of the goods in question for the damages they received, for the reason they were not liable to the owners. The defence is personal to the libellants, and they may or may not avail themselves of it, and having elected to pay, the claimants, *being wrong doers*, cannot say that they, the libellants, paid it in their own wrong.

Had the libellants not paid the damage to those entitled to receive it, they would hold the recovery in this case for their benefit. But having paid the damages, the recovery will be for themselves.

17 How. U. S. Rep. 152.
12 " " " " 466.

The proof as to the pianos is plain and explicit. The witness, Littlejohn, says that the owners of these instruments claimed that they were entirely ruined and were valueless, and yet by way of compromise they offered and did allow $20 for them on their being returned. That not wishing to rely wholly upon their representations, he advised and consulted with other dealers in respect to

them, and was assured that the advice of the owners could be relied upon, and as we infer from the proof they informed him that pianos wet and injured as these had been, were ruined and valueless. (Vide page 59.)

Mr. Littlejohn paid nothing without proper vouchers being presented to him. In some instances the consignees of the goods had forwarded or presented their bills of purchase directly to the libellants, and with these they ascertained and adjusted their actual loss. In these instances the libellants gave their draft upon Mr. F. S. Littlejohn for the amount thus ascertained and agreed upon. In other cases the settlements were made by Mr. F. S. Littlejohn, who in all instances made the payments, and as he says "in good faith and without making any deductions or abatement." He also says that he "made the negotiations for the settlement of the major part of the claims paid by him."

Under this 4th exception the claimant may allege that we paid to Worthington & Co. and others claims that we were not bound to pay.

To this we make several answers: 1st. if any such contracts were ever made, the claimants were not parties to and had no interest in them; were in no respect privy to them and therefore cannot set them up in this suit.

2d. The testimony was inadmissible.

3d. It was proven by Mr. Littlejohn that "as a general usage among forwarders this claim was never meant to avoid the common carrier's risk between New-York and lake ports, but meant merely to cover the rivers connected directly with the lakes, to wit: The St. Lawrence, Genesee, Niagara, Cuyahoga, Huron, Maumee, Raisin, Detroit, St. Clair, Milwaukee and Chicago."

No presumptions can be drawn against the libellants.

No objection was raised on the trial that the management of the boat and cargo was wrong and illegal.—The boat was not suffered to remain in the river an unreasonable time. Not the slightest testimony on this

subject has been offered. On the contrary she was raised as soon as she could be and with all despatch.

This would be a just inference had not the fact been established by proof, especially as no complaint in this respect was made or heard on the trial.

The raising the boat was difficult to accomplish, and required peculiar boats and preparations. Before she could be got up, she was run over and greatly damaged, as was also her cargo, and all this was the result of the collision.

The claimant was not ignorant of the position of the boat and cargo. The steamer had sunk them early in the evening and its crew saw her go down and knew where she was lying. It could expect no notice of the time when she was to be raised, nor even when they would commence such an undertaking. Having caused the disaster, its servants and crew should have volunteered to relieve her instead of abandoning her as they did. The damaged goods were sold at auction, which is the usual course. Nothing was sold at private sale except a damaged *chair* and *not an article was purchased by the libellants* either at auction or at private sale.

The bar tin was injured by wetting and rusting, and sold for the best price it would bring at auction. Its proceeds were allowed and deducted from its actual costs, and the balance charged to the claimants.

There was no necessity of an appraisement. Everything was saved that could be and disposed of at auction at the best price that could be obtained.

Nor could the respondent expect any notice of such auction sale, especially as it was a non-resident corporation, whose location was unknown, and which had abandoned the boat and her cargo to its fate.

Notes or payments were made to no parties except the owners of the goods, and their ownership was established by the bills of sale, shipping receipts, &c. in each instance.

The report of the commissioner is fully sustained by